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## The Code, the Consumer, and the Institutional Structure of the Common Law

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# THE CODE, THE CONSUMER, AND THE INSTITUTIONAL STRUCTURE OF THE COMMON LAW

EDWARD L. RUBIN\*

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\* Professor of Law, University of California, Berkeley School of Law (Boalt Hall). I served as Chair of the American Bar Association's Ad Hoc Committee on Payment Systems from 1986 to 1990, when I resigned. My experiences in this position are described in Edward L. Rubin, *Thinking Like a Lawyer. Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743 (1993). It is an understatement to say that my views about the UCC do not reflect those of the ABA.

I would like to thank Robert Cooter, John McNulty, and Eric Rakowski for their help with this Article.

As is generally known, the Uniform Commercial Code ("Code" or "UCC") has not been kind to consumers.<sup>1</sup> The consumer movement is now at least thirty years old and represents one of the major developments in modern law. Congress has enacted dozens of consumer protection statutes during this period, and the various states have enacted hundreds. But the sponsors of the UCC the American Law Institute ("ALI") and the National Conference of Commissions on Uniform State Laws ("NCCUSL") have generally refused to take these developments into consideration. The statutes they produce tend to display the same attitude toward consumers as their predecessor statutes did fifty or one hundred years ago. The new Article 2A reveals a modicum of progress on this front, but the recent revisions of Articles 3 and 4 were specifically designed not to change the original balance between banks and consumers,<sup>2</sup> even though one observer described that balance, when established in 1950, as "a deliberate sell-out of the American Law Institute and the Commission of Uniform State Laws to the bank lobby."<sup>3</sup>

Two reasons are generally given for the sponsors' position toward consumer issues. The first is that they are making a good faith effort to draft legislation which achieves certain goals, such as uniformity, clarity, and technological modernity, while being politically acceptable to all state legislatures.<sup>4</sup> Indeed, the overarching goal of uniformity could not be

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1. See generally Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827 (1992); Egon Guttman, *U.C.C. D.O.A.: Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625 (1993); Gail Hillebrand, *The Redrafting of Articles 2 and 9: Model Codes or Model Dinosaurs?*, 28 LOY. L.A. L. REV. 191 (1994); Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA L. REV. 679 (1991); Donald B. King, *Major Problems With Articles 2A: Unfairness, "Cutting Off" Consumer Defenses, Unfilled Interests, and Uneven Adoption*, 43 MERCER L. REV. 869 (1992); Edward Rubin, *Efficiency, Equity and the Proposed Revision of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

2. See Thomas C. Baxter, Jr., *The UCC Thrives in the Law of Commercial Payment*, 28 LOY. L.A. L. REV. 113, 126-27 (1994); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 LOY. L.A. L. REV. 743, 746-47 (1993).

3. Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334, 362 (1952); see also Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 YALE L.J. 364, 374-77 (1952) (concurring with Beutel's assessment of Article 4).

4. See Fred H. Miller, *U.C.C. Articles 3, 4 and 4A: A Study in Process and Scope*, 42 ALA. L. REV. 405, 410-24 (1991); National Conference of Comm'rs on Unif. State Laws, *Prefatory Note*, reprinted in SELECTED COMMERCIAL STATUTES 238, 239-40 (West 1996) (discussing revision process of Articles 3, 4, and 4A and the need for uniformity); *PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, reprinted in 46 BUS. LAW. 1869, 1871-72 (1991); Carlyle C. Ring, Jr., *The UCC Process—Consensus and Balance*, 28 LOY. L.A. L. REV. 287, 291-92 (1994); William D. Warren, *UCC Drafting: Method and Message*, 26 LOY. L.A. L. REV. 811 (1993).

achieved without acceptability. Consumer protection is simply too controversial, it is argued; the mechanisms that some states would find excessive would be regarded as inadequate by others. Thus, the UCC does not preclude consumer protection efforts, but simply leaves this matter to individual state enactments and focuses on the areas of commerce where consensus is attainable.

A second explanation is that commercial interests dominate the the UCC drafting process. Consumers have obtained a voice in Congress and in most state legislatures, but they have been effectively excluded from the development of the UCC. This point has been noted by a wide variety of observers, conceded by several drafters, and never seriously disputed by the UCC's proponents.<sup>5</sup> What was originally envisioned, and continues to be represented, as a neutral, balanced, expertise-based process has in fact been more one-sided than the supposedly self-interested, venal legislatures in the majority of American jurisdictions.<sup>6</sup>

There is, however, a third reason for the UCC's indifference to consumer concerns, which can be described as conceptual. The entire framework of the

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5. See Beutel, *supra* note 3, *passim*; Allison Dunham, *Reflections of a Drafter*, 43 OHIO ST. L.J. 569 (1982) (discussing bank and commercial lawyer domination of the drafting process); Gilmore, *supra* note 3, at 374-77; Fairfax Leary, Jr. & Michael A. Schmitt, *Some Bad News and Some Good News from Articles Three and Four*, 43 OHIO ST. L.J. 611, 612-13 & nn.5-6 (1982) (listing members of committees); Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 88-106 (1993) (describing history of lack of consumer involvement); Donald J. Rapson, *Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 LOY. L.A. L. REV. 249, 255, 266-81 (1994) (conceding lack of and need for consumer representation in Article 5 revision); Rubin, *supra* note 2, at 746-48, 787 (noting lack of consumer representation); see also Alan Schwartz & Robert Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595 (1995) (discussing function of private legislatures in comparison to public legislatures); Robert Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783 (1994) (same). Dunham, Gilmore, and Leary were all drafters of the original UCC (although Leary was dismissed as a result of bank pressure, see Beutel, *supra* note 3, at 359; Leary & Schmitt, *supra*, at 612-13). Warren, also a drafter, virtually concedes, in his account of his own participation, that banks dominated the Article 3 and 4 revision process, although he is too polite to say this explicitly. Warren, *supra* note 4, at 813-22. Rapson, although acknowledging industry pressure with respect to Article 5, where he was on the losing side, asserts that the Article 3, 4, and 4A revisions were not dominated by banking interests. Rapson, *supra*, at 265-81. His only evidence is that attorneys from the Federal Reserve participated as well. *Id.* While that may provide some reassurance, it is not quite the same as consumer representation. With respect to Article 4A, for example, the "consumers" were large corporations who had the wherewithal to participate and ultimately did so; they did not seem to believe that Federal Reserve participation was sufficient to represent their interests. See Rubin, *supra* note 2, at 762-67.

6. For an account of the Code's drafting as a struggle between public-oriented and self-interested groups, see Corinne Cooper, *The Madonnas Play Tug of War with the Whores or Who Is Saving The UCC?*, LOY. L.A. L. REV. 563 (1993).

UCC is based on common law. While it is obviously a statute, and may even claim to be a code, it relies heavily upon the common-law models. Sometimes it follows these models slavishly, and sometimes it modifies them creatively, but common law has remained at the foundation of the vast majority of the Code's provisions. As a result, the Code inherits the common law's blindness to consumer concerns, the very blindness which led directly to the law reform efforts of the consumer movement.

The continuation of the common law in the Code's substantive provisions has been widely noted; Gilmore likened Article 3's preservation of negotiability, even before *Jurassic Park*,<sup>7</sup> to "a fly in amber."<sup>8</sup> Less attention has been paid, however, to the Code's continuation of the common law's institutional structure. Perhaps this structure, which essentially consists of privately-initiated judicial trials, is so obvious and so general that it is not deemed worthy of attention in specific discussions of the Code; perhaps it is regarded as inherent in state law, to which the Code is necessarily committed. In fact, it is important and represents a major explanation for the Code's apparent indifference to consumers. Even if the sponsors were willing to take more risks on the acceptability of their statutes, and even if they were willing to restrict or counter-balance the influence of commercial interest groups, the conceptual commitment of the drafters to the institutional structure of the common law would have ensured that the Code would largely ignore consumer concerns.<sup>9</sup> Of course, one may argue that the sponsors' motivations and the interest group pressure caused the conceptual attitudes that their statutes reveal. One could also argue the reverse, however—that these attitudes have made the sponsors receptive to certain policies and certain types of special interest group importuning. In fact, the relationship between the two is probably co-causal and certainly complex. Whatever the relationship may be, the conceptual structure of the Code provides important insight into its failure to provide protection for consumers.

This Article argues that the enforcement mechanism that was unthinkingly embodied in the UCC severely disadvantages consumers in their effort to

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7. (Universal 1994).

8. Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 461 (1979). On the continuation of the common law in general, see CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990).

9. For a similar argument regarding the substantive provisions of Article 3, see Lary Lawrence, *Misconceptions About Article 3 of the Uniform Commercial Code: A Suggested Methodology and Proposed Revisions*, 62 N.C. L. REV. 115 (1983).

obtain the legal remedies that the UCC itself provides. In particular, Part I asserts that it often prevents them from initiating lawsuits and generally means that the merchant will spend more resources on litigating any lawsuit than the consumer will. Part II argues that this situation is both unfair and inefficient. Part III suggests that the UCC would be a much better statute if it had freed itself from common-law concepts and implemented innovations such as attorneys' fees and other reconceptualized procedures, public enforcement of consumer complaints, and government-run product testing centers. To put the matter more generally, would it not be wonderful if the prestigious institutions that sponsored the UCC had placed themselves at the forefront of legal developments and showed some sympathy for ordinary people, rather than being the most retrograde force in their field, and sympathizing only with commercial parties?

### I. THE LIMITS OF THE COMMON LAW

The common law, of course, has been the subject of intense scholarly interest for at least two hundred years. It found its St. Paul in William Blackstone, whose *Commentaries* may be the most influential law book ever written,<sup>10</sup> and suffered its Martin Luther in Jeremy Bentham, whose work points toward the current predominance of legislation.<sup>11</sup> Bentham's criticisms are largely institutional, and some of these were revived and expanded by the legal realists, among them Karl Llewellyn, the progenitor of the UCC.<sup>12</sup> However, the legal realist critique of the common law focused largely on its substantive provisions, generally proposing different rules that were to be implemented by the same judicial mechanism. This was followed by a counter-trend, as Llewellyn and other scholars, perhaps suffering from the guilt of patricide, tried to rehabilitate common-law reasoning, a tendency that continues to the present day.<sup>13</sup>

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10. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Garland Publ'g 1978) (W. Straham & T. Cadell, London 1783).

11. JEREMY BENTHAM, *A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT* (J.H. Burns & H.L.A. Hart eds., 1977); JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (J.H. Burns & H.L.A. Hart eds., 1970).

12. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); K.N. Llewellyn, *The Rule of Law in Our Case-Law of Contracts*, 47 YALE L.J. 1243 (1938); see also Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

13. See KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960). For recent efforts, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* (1988); and CASS SUNSTEIN, *LEGAL REASONING*

The institutional features of the common law were criticized somewhat later by both the legal process school and the consumer movement. According to legal process, the courts which create and implement the common law have intrinsic limitations that preclude them from functioning as effective policymakers, and they should consequently defer to the political branches.<sup>14</sup> Here too, there has been a recent tendency in the opposite direction. This tendency is partially a result of the public-choice movement, which emphasizes that the political branches also suffer from serious limitations,<sup>15</sup> and partially a result of interpretivists and new public-law scholars who have re-evaluated the role of courts.<sup>16</sup>

But the rehabilitation of judicial decision making and judicial institutions has not addressed the institutional criticisms that were voiced by consumer-oriented observers. These criticisms are that courts are an ineffective means of enforcing the law and that their structural features create inherent disadvantages for consumers. The drafters of the Code responded to the concerns voiced by the legal realists, but have largely ignored the concerns that the consumer movement subsequently articulated. While this is hardly surprising, given the era in which the Code was initially drafted, it is indeed surprising that the Code's conceptual structure has changed so little during the half century between its initial formulation and the present time.

#### *A. The Code's Rejection of the Common Law's Institutional Structure*

Bentham's criticism of the common law is that it is disorganized and incoherent, a point reiterated by the legal realists. Because it developed by accretion, rather than by advance planning, the common law contains a welter of provisions that do not necessarily fit together. There is, moreover, no

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AND POLITICAL CONFLICT (1996).

14. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 374-75 (William N. Eskridge, Jr. & Phillip P. Frickey eds. 1994). See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

15. See, e.g., *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (James M. Buchanan et al. eds., 1980); Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

16. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991); CALABRESI, *supra* note 13; RONALD DWORKIN, *LAW'S EMPIRE* (1986); MALCOLM M. FEELEY & EDWARD L. RUBIN, *THE POLICYMAKING JUDGE AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (Cambridge Univ. Press forthcoming 1997).

articulated principle that can be used to reconcile conflicts or to relate individual rules to a larger structure. The chaotic, disorganized character of the common law has certainly supplied a sustaining intellectual puzzle for academic casebook and treatise writers, but it has not been nearly as enjoyable for those whose lives are governed by its strictures.

A second difficulty with the common law is specific to the United States. Common law is state law, which means that it differs in each of America's separate jurisdictions. Moreover, there is no overarching authority that can reconcile differences between the laws of each state. The Supreme Court did perform this function for a while in commercial law, as exemplified by its decision in *Swift v. Tyson*,<sup>17</sup> but, being generally occupied with matters that were perhaps more important, and certainly more interesting, it did so intermittently—certainly not with the sustained attention that the House of Lords devotes to differences between Commonwealth courts.<sup>18</sup> Even this limited exercise of common-law authority ended in 1937 with *Erie v. Tompkins*, when the Court declared such a role unauthorized and perhaps unconstitutional.<sup>19</sup>

The UCC, and the uniform laws movement in general, certainly cannot be accused of preserving common-law thinking in these areas; indeed, disorganization and non-uniformity were precisely the problems that this movement was designed to resolve. It might be said that NCCUSL was designed to achieve uniformity among America's multitudinous jurisdictions, while the ALI was designed to bring order to the previously chaotic common law,<sup>20</sup> but this formulation is probably overly schematic. In fact, NCCUSL aspired to organize the law as well as unify it, while the ALI's *Restatements* were intended to encourage uniformity as well as order. In any case, both instincts were certainly combined when these two organizations jointly sponsored the creation of the UCC. The UCC was envisioned as a means of establishing uniform commercial law throughout the United States and

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17. 41 U.S. (16 Pet.) 1 (1842). William Fletcher has argued persuasively that *Swift* did not establish this doctrine, but simply confirmed an accepted principle of law. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

18. NICOLAS BALDWIN, *THE HOUSE OF LORDS: A STUDY IN EVOLUTIONARY ADAPTABILITY* (1983).

19. 304 U.S. 64 (1938).

20. See generally Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233 (1965); Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283; William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967).



simultaneously systematizing the content of that law.<sup>21</sup>

There can be little doubt that the sponsors succeeded in achieving both of their aspirations. The Code is a well-organized document—divided into articles that, by and large, make sense, and organized into parts and sections that, by and large, follow a logical sequence. It generally addresses each issue with a specific, identifiable provision or set of provisions, and each provision generally states a specific, if not always unambiguous, rule. Although adoption of the Code progressed slowly at first, it accelerated in the 1960s, and by 1968, every state except Louisiana had adopted it in its entirety.<sup>22</sup> Henceforth, business people would be able to look to a single source when they wanted to know what law would govern their activities, and when they looked to that source, they would usually be able to figure out what it said.<sup>23</sup>

The UCC also embodied a third aspiration that may be regarded as institutional, or at least possessing institutional components. This was the legal realist project of rejecting the autonomy of law and adopting pragmatic rules that reflect the commercial practices that business people actually employ.<sup>24</sup> The Code's achievement is somewhat more uneven in this area. In drafting Article 2, Llewellyn dispensed with the rule of title, perfect tender, and the mirror image rule for offer and acceptance, replacing them with flexible provisions for allocating loss, curing defects, and enabling the transaction to go forward despite minor disagreements.<sup>25</sup> In Article 9,

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21. See Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779 (1953); Schnader, *supra* note 20.

22. See ROBERT BRAUCHER & ROBERT A. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS at xxxvii (1977). The bulk of the adoptions came in the mid-1960s. The sole holdout, Louisiana, cannot really be regarded as rejecting the UCC because the UCC is conceived as a codification of common law, and Louisiana uses code law as a result of its Gallic origins.

23. Doubts have been raised about the Code's coherence and clarity, however. See, e.g., Lary Lawrence, *What Would Be Wrong with a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659 (1993); David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185 (1967).

24. See generally Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); Ingrid Michelsen Hillenger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 GEO. L.J. 1141 (1985); Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325 (1995); Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux*, 97 HARV. L. REV. 1495 (1984) (reviewing LEON A. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983)).

25. U.C.C. § 2-401 (1995) (passing of title); see *id.* cmt. 1 ("This Article deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed."); *id.* § 2-508 (seller's right to cure improper tender); *id.* § 2-207 (additional terms beyond those agreed to by parties); *id.* cmt. 2

Gilmore replaced the welter of security instruments that included chattel mortgages, trust receipts, factor's liens and field warehouses—a veritable Exhibit A for Bentham's criticism of the common law—with the unified, functionally designed instrumentality of a security interest.<sup>26</sup> Articles 3 and 4, however, preserved the formalism of their predecessor with an almost antic reverence, as Gilmore pointed out.<sup>27</sup> Additionally, Article 7 initiated the unfortunate practice of promulgating provisions that had already been preempted by federal law.<sup>28</sup> Overall, however, there was a clear movement away from the self-contained approach to law that we associate with formalism and toward practical, commercially relevant rules—a movement that nicely complimented the Code's undefiled achievements in unifying and clarifying common law.

### *B. The Code's Continuation of the Common Law's Institutional Structure*

The Code's changes in the institutional structure of the common law did not, however, include changes in the common law's approach to enforcement. Indeed, the Code assumes that this enforcement structure—private law suits adjudicated by trial courts—will continue unchanged. This choice of enforcement mechanism was never re-evaluated; indeed, it was not really a choice at all, but an unexamined assumption of the sponsors, the drafters, and

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("Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract.").

26. U.C.C. § 9-101 cmt. (1995) ("This Article sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures. It supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor's liens and assignments of accounts receivable . . .").

27. Gilmore, *supra* note 8, at 448 (noting the preservation in Article 3).

28. Article 7 covers bills of lading and warehouse receipts, but bills of lading in interstate commerce had been previously covered by the Federal Bills of Lading Act, 49 U.S.C. §§ 81-124 (1994), which was enacted in 1916. This dubious tradition continued with the promulgation of Article 4, *see* Baxter, *supra* note 2, at 125-28, which had already been so heavily preempted by the Federal Reserve's Regulation CC, 12 C.F.R. pt. 229 (1996), that the drafters themselves recommended that the effort be abandoned. Rubin, *supra* note 2, at 773-81. Warren does not acknowledge this, however, in his defense of the UCC process. Warren, *supra* note 4.

Norman Silber argues that Article 4 makes unnecessary concessions to federal law by means of various provisions that subordinate the Code to federal enactments, informal as well as formal. Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102 (c)*, 55 U. PITT. L. REV. 441 (1994). This again suggests the force of a conceptual explanation for the Codes's failures. Rather than rethinking its provisions and its general role in light of federal legislation, the UCC drafters preferred to leave existing, preempted provisions in place and concede the dominance of federal law in a few delimited sections.

the enacting legislatures. By virtue of this inadvertent decision, these various parties preserved, in a modern code, an approach to law that was enormously ancient, the product of a culture so remote that it is virtually incomprehensible to contemporary Americans. While there is a certain charm in traditionalism of this sort, its practical effects require serious examination.

The sponsors' choice of enforcement mechanisms meant that suits under the UCC must be initiated and pursued by private parties. In criminal law, such an approach would be properly regarded as an outright atavism, harkening back to the blood feuds and the *wergild*<sup>29</sup> of pre-medieval England. In civil law, private prosecution is still regarded as the norm, but statutes have increasingly modified it or replaced it with agency enforcement in order to address consumer protection problems.<sup>30</sup> Generally speaking, private prosecutions will be deemed satisfactory in societies where law is regarded as a matter of private right and where material resources are viewed as being directly correlated with intrinsic human worth. This was largely the case in Anglo-Saxon England; the central administration was weak, power rested in the hands of the nobility, and the great majority of the ordinary people were subordinates, if not serfs or slaves.<sup>31</sup> Today, however, enforcement of law is regarded as part of a justly ordered society, and all people are regarded, absent proof of crime, as possessing equal worth. Our continued use of private enforcement mechanisms is simply a holdover from an earlier and long rejected social system; it represents little more than a continuing failure of imagination or commitment.

None of this is meant to suggest that merchants invariably try to oppress or cheat consumers. The United States has a well-established, competitive commercial economy, and the majority of merchants are probably fair and honest, even without legal supervision, because they want to maintain their reputations. Rather, the point is that the law, because of its defective

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29. *Wergild* is defined as "the value set in Anglo-Saxon and Germanic Law upon the life of a man in accordance with his rank and paid as compensation to the kindred or lord of a slain person." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1340 (1985).

30. See, e.g., Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41-58 (1994)) (misleading and deceptive trade practices); Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77b (1994)) (agency enforcement of misleading and fraudulent securities sales); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78j (1994)) (same); Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 5 U.S.C. §§ 5314-5315; 15 U.S.C. §§ 2051-2084 (1994)) (potentially dangerous consumer products).

31. PETER HUNTER BLAIR, *ROMAN BRITAIN AND EARLY ENGLAND* 238-72 (1963); WINSTON CHURCHILL, *THE BIRTH OF BRITAIN* 82-149 (1956).

enforcement system, provides little additional support for consumers. The less frequent, but still significant, number of cases where merchants do cheat consumers and the larger number of cases where there are genuine misunderstandings represent the areas in which the law should operate. The ineffectiveness of its enforcement mechanism means that it fails to perform this role.

There are three principal reasons why private enforcement fails. First, ordinary people often experience great difficulty in initiating lawsuits and as a result, often abandon their rights. Second, lawsuits are structured to place the party with fewer resources at a serious disadvantage. Third, the nature of common-law remedies exacerbates the other problems and creates additional difficulties.

### 1. Initiation

If General Motors decides that it wants to sue, it will do so, one hundred times out of a hundred. This is not true for consumers, however, as a result of both economic and emotional factors. Economically, more consumers will face fairly high search costs in initiating a lawsuit. Typically, the consumer will not have an ongoing relationship with a lawyer, and certainly not with a commercial lawyer. The level of difficulty that consumers experience in locating a lawyer depends upon their socio-economic status, their existing relationships or social network, their available time, and their personal inclinations. Many consumers simply abandon claims they regard as meritorious because the task of locating a lawyer seems so daunting.<sup>32</sup> Moreover, in relatively small cases—and most consumer cases are relatively small—the legal fees will exceed the amount at issue. Even a famished local attorney is unlikely to charge less than one hundred dollars an hour, and a fully litigated case is unlikely to require less than twenty-five hours of legal work.<sup>33</sup> This is particularly true because the UCC, again following the

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32. See ARTHUR BEST, *WHEN CONSUMERS COMPLAIN* (1981); Arthur Best & Alan R. Andreason, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701 (1977).

33. The time estimate includes the trial itself, plus conferring with the client, preparing a complaint, reviewing the answer, preparing interrogatories, responding to interrogatories, conducting a deposition, and developing a trial strategy. Of course, the case may settle before trial, and in fact, most cases do. See Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 *STAN. L. REV.* 1339 (1994); Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 *JUDICATURE* 161 (1986). To proceed with litigation one cannot afford to pay for, on the assumption that the case will settle at an early stage, seems like the sort of risk-prone behavior that

common law, requires so many fact-dependent determinations, rather than relying on approximations or presumptive rules.<sup>34</sup> The result is that, even ignoring court costs, there is a minimum amount, perhaps \$2500, for which it is rational for a consumer to retain an attorney.<sup>35</sup> Below that amount, the consumer must try the case herself, something few consumers are equipped to do.

Both small claims courts and class actions are designed to overcome this barrier to initiating suit. While small claims courts represent an important institutional innovation,<sup>36</sup> a rational consumer may hesitate to bring suit in this forum because of the opportunity cost of her time. Moreover, the merchant, bank, or other commercial party is likely to be represented by a lawyer, and consumers may discount the value of their lawsuit when they realize that they will be arguing against a professional.<sup>37</sup> Of course, they may

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consumers are unlikely to adopt. Moreover, as will be discussed below, *see infra* text and notes 52-56, merchant defendants are in an excellent position to call the consumer's bluff.

34. Rubin, *supra* note 1, at 569-70.

35. These figures are conservative. In their study of civil jury trials in the California superior courts, Samuel Gross and Kent Syverud found that the mean length of the trial phase in commercial trials was 13 days (for the 1990-91 year). *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1, 33 tbl.18 (1996). They estimate attorney costs at \$600 per hour of trial, yielding an average cost of \$62,400. *Id.* at 44. Undoubtedly, attorney costs are higher in California than in most parts of the country, and a consumer with a small case may be able to find a hungry attorney who will charge less than the prevailing rate. Still, it seems quite that Gross and Syverud's cost estimates are more realistic than the ones in the text.

The University of Wisconsin Civil Litigation Research Project appears to present a somewhat different picture. Its study of disputes found that 41% of cases involved less than 25 hours of attorney time and that 46% of cases involved legal expenses of under \$1000 (in 1978). *See* David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. REV. 72, 90-92 (1983). But the Wisconsin study includes all disputes, not just litigated cases. Indeed, trials, hearings and appeals occupied only 9.4% of the total attorney time in the sample. *See id.* at 91 tbl.3. As will be argued below, nontrial resolutions are likely to be much cheaper than trials, even if the consumer consults a lawyer. *See* Part III. But if trial is the only credible threat the consumer has, and the merchant knows that, then the consumer will need to be prepared to spend the amount that the trial would cost in order to establish that threat and obtain a settlement.

36. *See generally* JOHN C. RUHNKA & STEVEN WELLER, *SMALL CLAIMS COURTS: A NATIONAL EXAMINATION* (1978); SMALL CLAIMS COURT STUDY GROUP, NAT'L INST. FOR CONSUMER JUSTICE, *LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER* (1972); Arthur Best & Deborah Zalesne, *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 FORDHAM URB. L.J. 343 (1994); Suzanne Elwell & Christopher Carlson, *Contemporary Studies Project: The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990).

37. Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 227 (1974). At its worst, small claims court itself becomes an additional threat to the consumer. *See* Leslie G. Kosmin, *The Small Claims Court Dilemma*, 13 HOUS. L. REV. 934 (1976); Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

decide to consult an attorney themselves, but this will vitiate part of the cost savings that provides the rationale for this mechanism.<sup>38</sup> Most seriously of all, small claims courts lack the mechanisms to enforce their judgments, so that many winning plaintiffs never collect any money.<sup>39</sup> These difficulties may drop the suit below the threshold where the potential return exceeds the cost.

Class actions are also a valuable mechanism. However, only a small proportion of consumer complaints can be aggregated, and burdensome notice requirements restrict the number of practicable class actions even further.<sup>40</sup> Significantly, neither small claims courts or class actions are mentioned in the UCC; a state could abolish both ways of ameliorating the initiation problem and the sponsors would still be urging that state to adopt the Code.

In addition to the rational or economic concerns which discourage consumers from enforcing their rights, there is another impediment to the private initiation of law enforcement. Many consumers are probably fearful of the law, which they regard it as arcane, complex, and dangerous; based on their life experience, they are very often right. In addition, many people prefer to avoid conflictual situations, and a lawsuit, even one in small claims court, is inherently conflictual. It is easy for the drafters of the UCC, all of whom are law-trained, and for the UCC's proponents, many of whom are lawyers and all of whom have regular and extensive contacts with the legal system, to dismiss these popular fears and disinclinations. But such a dismissal reflects outmoded common-law thinking; it treats the consumer's lawsuit as a purely private right, the way Anglo-Saxon criminal law treated the nobleman's right to wergild. A modern view of law suggests that private lawsuits are the UCC's exclusive mechanism for enforcing the substantive provisions that constitute its program for commercial regulation. If that mechanism is underutilized—even for irrational reasons—then the program that appears in the neatly organized pages of the UCC is not being effectively implemented. The drafters may feel justified in punishing irrational consumers, but what

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38. See Elwell & Carlson, *supra* note 36, at 470-72.

39. RUHNKA & WELLER, *supra* note 36, at 161-69; Best & Andreason, *supra* note 32, at 733; Best & Zalesne, *supra* note 36.

40. See generally American Bar Ass'n Section of Litigation, *Report and Recommendations of the Special Committee on Class Action Improvements*, 110 F.R.D. 195 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625 (1987); Richard G. Chaney, Note, *Civil Procedure—Class Action—Amending Rule 23 in Response to Eisen v. Carlisle & Jacquelin*, 53 N.C. L. REV. 409 (1974).

they are actually doing is undermining the effectiveness of the statute they designed.

To summarize, there are a series of factors that deter consumers in a trial-based, lawyer-dependent system from enforcing their substantive rights. These include the search costs in finding a lawyer, the relatively high minimum cost of litigating the case, and the ordinary person's discomfort with the legal system. Taken together, these factors suggest that the average consumer, for the average compliant, has "no access to law," in Laura Nader's phrase;<sup>41</sup> consumers are simply outside the scope of the UCC because the UCC provides no usable mechanism for them to resolve their complaints. Empirical evidence supports this conclusion; even after perceiving that they have a grievance most consumers, a category that includes many people with UCC-based grievances, simply "lump it."<sup>42</sup>

## 2. Trial

Once the consumer manages to overcome the barriers to initiating a lawsuit, the next step, according to the institutional system of the common law, is a judicial trial. As its name suggests, a trial is a test of strength. It is supposed to test the strength of one's case, but all too often it tests the economic strength of the parties. When a consumer is suing a merchant, the consumer almost always has less economic strength and is almost always at a disadvantage.

The adversarial, confrontational structure of a trial, where two parties appear before a passive decisionmaker, is in fact a throwback to the medieval practice of trial by combat.<sup>43</sup> To us, this practice is extremely odd, for its outcome seems to depend upon the physical strength of the parties rather than the justice of their causes. What is even more odd is that those who could not fight could nominate a champion to fight in their place. Thus, in Chrétien de

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41. NO ACCESS TO LAW (Laura Nader ed., 1980).

42. Best & Andreason, *supra* note 32; Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 14-18 (1983); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81).

43. See ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL 116-26 (1986); 3 BLACKSTONE, *supra* note 10, at 338-41; Morton W. Bloomfield, *Beowulf, Byrhtnoth, and the Judgement of God: Trial by Combat in Anglo-Saxon England*, 44 SPECULUM 545 (1969); M.J. Russell, *I Trial by Battle and the Writ of Right*, 1 J. LEGAL HIST. 111 (1980) [hereinafter Russell I]; M.J. Russell, *II Trial by Battle and the Appeals of Felony*, 1 J. LEGAL HIST. 135 (1980) [hereinafter Russell II].

Troyes's romance, *Yvain*, Lunette has been accused of betraying her mistress, and is to be burned the next day, when Yvain, the gallant hero of the romance, happens to pass by the cell where she is imprisoned. Hearing of her plight, he promises to return and fight on her behalf, which he does, after a brief detour to dispatch an evil giant. He then challenges Lunette's accusers and defeats them in battle, with the help of a vicious attack by his pet lion. Lunette is thus declared innocent of the charge of betrayal.<sup>44</sup> This works very well in a romance, much better than a civil trial, but as a real-world mechanism for resolving civil disputes, it depends upon a military tradition and a belief that God directs the outcome of the combat.<sup>45</sup>

Contemporary trials translate this ancient mechanism into modern terms, but only to a limited extent. Instead of combat, trials now depend upon argument, supporting a rationalist legal tradition that is as strong as the military tradition of the Middle Ages. It is true now, as it was then, that only a minority of the population is fully versed in the tradition, but it is also true that one can nominate a champion to argue on one's behalf. The difference is that we do not believe that God will ensure that the outcome of the trial is fair. Rather, consistent with our own ideology, we believe that the person with the correct position will prevail because that person will be able to convince the decisionmaker through argumentation.

But this translation of medieval combat into modern argument is incomplete, indicating that we are using a borrowed mechanism, rather than one we have designed for ourselves. In the medieval trial, God is able to discern whose cause is just and grant that person victory with absolute precision. In *Yvain*, the reader knows from Chrétien that Yvain's cause is just, so that even when he breaks the rules of chivalry by receiving help from his lion, we are certain that the combat has produced the proper victor. In a modern trial, however, we acknowledge that no external force determines the outcome and that the decision is made by human beings. Consequently, it is quite possible, according to our own view of the situation, that victory will go to the party with greater strength—economic strength, in this case—rather than to the one whose cause is just according to the substantive law. In other words, our adaptation of medieval procedure no longer carries the same assurance of justice, in the view of its own practitioners, as the original

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44. Chrétien de Troyes, *Yvain (The Knight with the Lion)*, in *ARTHURIAN ROMANCES* 281-373 (D.D.R. Owen trans., 1993).

45. See BARTLETT, *supra* note 43, at 116-26; Bloomfield, *supra* note 43.



version.

It might be argued that the extent of the parties' resources does not affect the results of a trial because a rational business will not expend more resources than the case is worth. Thus, in a small case, both the merchant and the consumer will spend the same relatively small amount. In large cases, consumers may lack the capital to pay the required legal fees in advance, but the market for legal services will provide them with the necessary resources through contingent fee arrangements. There is some validity to this position, but it is not true in small-scale commercial litigation between merchants and consumers. In litigation of this nature, the merchant will generally be willing to spend substantially greater resources than the consumer and will reap the consequent advantages in the contest between the two. The reasons, which lie in the structural differences between the two parties' positions, have been extensively explored by Ian MacNeil, H. Laurence Ross, Marc Galanter, Samuel Gross and Kent Syverud, Stewart Macaulay, and others,<sup>46</sup> but they are worth reviewing in the context of the UCC.

To begin with, the merchant, as opposed to the consumer, is a repeat player in the litigation game.<sup>47</sup> Thus, it may decide to pursue the suit in order to obtain a reputation that will deter other suits. Because the merchant derives long-term advantages from adopting an intransigent position, it may incur costs that equal or exceed the benefits of that particular suit. In other words, it may adopt a strategy at the trial stage of a particular suit with a consumer to affect the behavior of other consumers at the initiation stage. This might seem somewhat unrealistic, because an ordinary consumer will not know the litigation record of a particular merchant. However, if the consumer consults a lawyer, that lawyer may very well know that the merchant will spend more than the consumer's suit is worth and may discourage the consumer from pursuing the suit or recommend settlement for a small amount.<sup>48</sup>

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46. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9, *LAW & SOC'Y REV.* 95 (1974); Gross & Syverud, *supra* note 35; Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 *LAW & SOC'Y REV.* 507 (1977).

47. See Galanter, *supra* note 46; Gross & Syverud, *supra* note 35, at 52-56.

48. For an insightful discussion of the role of attorneys in fostering conflict or cooperation, see Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM L. REV.* 509 (1994). Gilson and Mnookin analyze the problem from the perspective of two evenly matched parties, and do not discuss situations where there is a serious imbalance. Their conclusion is that cooperation is most likely where reputational effects

Such a strategy, in order to be rational, must actually affect consumer behavior. Because the merchant does not necessarily know how many suits might be brought, it may estimate the reputational effects of aggressive litigation incorrectly. But if the strategy does work, or if the merchant overestimates the strategy's success, that merchant will oppose consumer suits with a greater level of resources than the consumers will devote to them, and the substantive law will be underenforced. It is only in those circumstances where the merchant underestimates the success of intransigence that its expenditures will not exceed those justified by the value of the suit itself. Such underestimation may occur, but it seems to run counter to general attitudes about commercial reputation. There may also be an agency phenomenon involved; corporate attorneys, like most people, probably believe in the efficacy of their efforts and thus may tend to overestimate the effects of aggressive litigation on consumers.<sup>49</sup> The result, of course, is that the amount of resources that the merchant devotes to litigation will be even greater.

A second reason why merchants will deploy more resources than consumers in any given lawsuit is that the principal resource, attorneys' services, is cheaper for the merchant. To begin with, attorneys' fees are tax deductible for a business, but not for an individual.<sup>50</sup> This may be viewed as a government subsidy to the merchant in an amount equal to the corporate tax rate, and means that the rational merchant will spend that much more than the rational consumer. At current corporate tax rates of thirty-four to thirty-five percent, the difference is substantial.<sup>51</sup> In addition, the merchant incurs no search costs in pursuing litigation because it will generally have either its own legal department or an ongoing relationship with outside counsel. The

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between lawyers are strong. Consumers would appear to be the group that has the lowest chance of taking advantage of a reputational network and obtaining a favorable outcome by that means.

49. Moreover, lawyers working for a contingency fee may have an incentive to settle quickly and avoid investing additional time in an uncertain recovery. See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198-202 (1987). Attorneys who work for, or are retained by, corporations tend to be paid on an hourly or salaried basis and thus have no such incentive.

50. I.R.C. § 162a (1994). Because it is corporate profits that are being taxed, the deduction only operates if the corporation is making money. Most corporations do so, however, because those that do not will not exist for very long.

51. I.R.C. § 11 (1994). The rate is 34% for income up to \$10,000,000 and 35% for income above that level. Income below \$75,000 is taxed at a lower rate, but this has been ignored for purposes of the analysis. It is worth noting, however, that this aspect of the analysis, and perhaps the analysis as a whole, does not apply to very small businesses.

consumer's search costs, even if they are not so high as to preclude litigation (because we are now considering problems with trial, rather than initiation) will nonetheless be significant in many cases. Finally, the merchant may realize economies of scale in obtaining legal services that will be unavailable to the consumer. A merchant confronted with a series of similar lawsuits will generally use the same attorneys to defend each suit. As a result, after the first few suits, the attorneys will benefit from their previous experience and will be able to achieve the same results with a lower expenditure of resources. Plaintiffs' attorneys also benefit from learning, to be sure, but the effort required to find these attorneys will involve additional search costs for the consumer. In addition, outside law firms may give large clients, who provide them with a steady diet of transactional work, a more favorable rate on small litigation matters, and they may discount the legal fees when they lose a case in order to keep the client.

A third reason why merchants will spend more on a given case, as William Woodward points out, is that they are risk neutral with respect to the potential loss, whereas the consumer is risk averse.<sup>52</sup> The risk involved in litigating a suit is the amount of the court costs and attorney's fees, a risk that must be balanced against the potential benefit of winning the case. The consumer can eliminate his risk by never initiating a suit or reduce this risk by "chickening out" at some point in the process, while the merchant can eliminate or reduce the risk by meeting the consumer's demand. Merchants are risk neutral because they are repeat players. Once they have decided that the benefit will exceed the cost in a given class of cases, a single loss is of no concern because that strategy will ultimately produce a net benefit as the game is repeated. Each consumer, on the other hand, plays only once; even if the odds are generally in his favor, a loss in his particular case cannot be recouped.<sup>53</sup> Of course, this is precisely how risk aversion affects decisionmaking; the consumer may view the certain loss of attorney's fees as outweighing the potential gain from the litigation, even if the total gain, when discounted by the probability of winning, remains higher than the certain loss.

This difference in risk profile due to the number of times one plays the game will be amplified by the absolute amount of the loss in proportion to each party's total wealth. As stated above, the minimum cost of litigation is

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52. William J. Woodward, Jr., *Contractarians, Community, and the Tort of Interference With Contract*, 80 MINN. L. REV. 1103, 1160-63 (1996).

53. See Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Case for Trial*, 90 MICH. L. REV. 319, 348-52 (1991).

likely to be \$2500. This represents a significant amount to the average consumer, but not to the average merchant. To put the matter more concretely, few merchants will have a bad year because they lost, in the aggregate, the amount represented by the attorney's fees in a single consumer lawsuit. In contrast, many consumers will have a bad year if they lose this amount—that is, the loss will produce a palpable effect on their lifestyle. Again, this makes the consumer more likely to chicken out, while the merchant will be prepared to invest the resources needed to complete the litigation.

The fourth reason why merchants will spend more than consumers in litigation is that they may be able to induce the consumer to chicken out at some point in the litigation process by pursuing an aggressive litigation strategy.<sup>54</sup> Litigation, of course, proceeds in stages. Once the merchant receives the consumer's complaint, it can either prepare an answer or offer a settlement. If it offers a settlement, it loses the amount of its offer, but saves the attorney's costs. If it decides to answer, it places an additional amount at risk. If the merchant answers, the consumer then faces a similar decision whether to proceed with interrogatories and perhaps depositions or to chicken out. The merchant then faces a decision whether to answer the interrogatories. If it does, both sides must decide whether to proceed to trial, which requires additional attorney costs.

These various decision points place the merchant in a good position to adopt an optimal strategy that takes advantage of the disparity in risk profile between merchant and consumer. In particular, the merchant can follow an aggressive, no-compromise strategy up to the eve of trial, then offer a settlement in cases it expects to lose. For example, suppose a merchant is confronted with a succession of cases which it can expect to lose about seventy-five percent of the time. Standard law and economics analysis suggests that it will settle these cases, and that is true for evenly matched parties. Litigation will proceed only when one or both parties overestimate the

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54. For discussion of the way that strategic considerations affect settlement negotiations, see GEOFFREY P. MILLER, SETTLEMENT OF LITIGATION: A CRITICAL RETROSPECTIVE, IN REFORMING THE CIVIL JUSTICE SYSTEM 13 (Larry Kramer ed. 1996); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75; Gilson & Mnookin, *supra* note 48; Gross & Syverud, *supra* note 53; and Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

chance of winning.<sup>55</sup> But when dealing with a resource-poor and risk-averse consumer, the merchant may obtain a more favorable result by adopting an aggressive strategy.

This can be illustrated by using the standard Priest-Klein model for settlement decisions,<sup>56</sup> modified for tax considerations and risk aversion. Assume the amount at issue is \$10,000 and the attorney costs to litigate are \$3000 for each side, virtually the minimum. The merchant's average loss, if the case goes to trial, will be about \$7000 (seventy-five percent of \$10,000, plus \$3000 in attorney costs reduced by thirty-four percent because of tax considerations). The average value of the suit to the consumer is \$4500 (the \$7500 average return less the \$3000 attorney costs). Assuming the consumer, through his attorney, has equally good knowledge of these chances, he would presumably demand about \$4000 to settle the suit at the outset—the average value of the suit, discounted by some amount because he is risk averse. Such a settlement would cost the merchant \$2700 after taxes, and because this sum is substantially lower than the merchant's average loss of \$7000, the case should settle. However, the merchant may improve its outcome by litigating aggressively at the pleading and discovery stages, thereby inducing a risk averse consumer to chicken out.<sup>57</sup> Even if it expends as much as \$2250 or \$1500 after taxes—three-quarters of its maximum rational expenditure for attorney costs—at these stages; it will save \$1200 over the settlement cost for each consumer it intimidates into chickening out. Of course, it will have lost that same \$1500 if it fails to intimidate the consumer because it could have settled the suit at the outset for minimal attorney costs. But the merchant will likely know whether a strategy of this sort will be effective because it is a repeat player, and it will adopt that strategy in situations where it works. Information from a lawyer will not equalize the situation for the consumer, because the consumer's risk aversion is not based on uncertainty about the merchant's strategy but on uncertainty about the outcome in his particular case.

In fact, the merchant may benefit by adopting overaggressive, scorched

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55. See John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

56. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

57. For a similar analysis, one not limited to the consumer context, see Gross & Syverud, *supra* note 53, at 371.

earth litigation practices. Instead of \$2250, suppose it spent \$4000—the same amount that would be required to settle the case—in the pre-trial stages of litigation. This additional attorney expenditure might require the consumer to spend a similar amount during the pre-trial stage in order to oppose the merchant. Confronted with well over \$4000 of attorney's fees for a \$10,000 suit of uncertain result (\$4000 of pre-trial expenditures, plus trial expenditures), virtually all consumers might chicken out, and the losses incurred on the small number who remain might be counterbalanced by the reputational effect that would discourage more consumers from initiating litigation in the first place.

A study by D. Rosenberg and Steven Shavell comes to the opposite conclusion:<sup>58</sup> that plaintiffs, including presumably consumer plaintiffs, are able to extract settlements from defendants by bringing nuisance suits; that is, suits that are sufficiently weak that the plaintiff would be unlikely to pursue the case to trial. Their analysis contains many equations, but it rests on some rather questionable premises. To begin with, Rosenberg and Shavell use a numerical example of a \$1000 case, which costs the plaintiff \$100 to litigate and the defendants \$200 to defend.<sup>59</sup> Of course, no one takes a \$1000 case to trial, and, no matter how small the amount at issue, the plaintiff could not even explain the case to her attorney by spending \$100 on legal fees. Shavell and Rosenberg are presenting a general mathematical model, so the amounts they choose as examples might be deemed irrelevant. But they are writing about nuisance suits, and their examples create the false impression that consumers could effectively bring such suits in the \$1000 range. In fact, there is a discontinuity in their equations which they do not note: below a certain amount, the consumer cannot initiate a suit, so the defendant will prevail even when the plaintiff's case is so strong that the defendant would never have brought the case to trial—a nuisance defense, to extrapolate from Rosenberg and Shavell's terms.

Even more seriously, Rosenberg and Shavell base their analysis on the premise that the plaintiff's complaint forces the defendant to choose between settling the suit and trying the case; thus, to use their figures, if the plaintiff demands \$180, the defendant will give in, even if both parties are certain that the defendant will win at trial, because giving in is cheaper than the \$200 cost

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58. D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

59. *Id.* at 4. The authors also include a \$25 filing fee. *Id.*

of defending the case. But the authors have apparently forgotten that there are intervening stages between the plaintiff's complaint and a trial. In particular, the defendant can answer the complaint, which is probably cheaper than preparing it, and certainly a fraction of the cost of a trial. At that point, the plaintiff must decide whether to incur the additional cost of preparing interrogatories and conducting depositions, something he may be loathe to do for a suit that, by hypothesis, he has no chance of winning. To use Rosenberg and Shavell's figures—on the assumption that we are living in law and economics land—if the complaint costs \$10 for the attorney to prepare, the plaintiff's cost of discovery may be as high as \$50 (assuming that responding to defendant's discovery costs \$10, trial preparation costs \$3.50, trial itself costs \$25, and \$1.50 must be reserved against the contingency of an appeal). Most rational plaintiffs are likely to chicken out at this point, rather than expend another \$50 in a losing cause. Again, it is the defendant, not the consumer plaintiff, that can use the costs of litigation to its advantage.

### 3. Remedies

The third way in which the Code embodies the institutional system of the common law is in the kinds of remedies that it provides. Many of the inequities at the initiation and trial stages could be ameliorated by different, nontraditional types of remedial provisions. The most obvious provisions are to allow prevailing consumer plaintiffs to recover attorney's fees and costs, to authorize consumers who feel aggrieved to employ self-help, and to fix the monetary amount of damages. Such provisions often appear in contemporary statutes,<sup>60</sup> but the UCC, ever in the thrall of common law, generally avoids them.

#### a. Attorney's Fees

To begin with, the UCC generally does not provide for awards of attorney's fees. Allowing a consumer to recover attorney's fees and costs, an adaptation of the so-called "English Rule,"<sup>61</sup> would resolve much of the

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60. See *infra* notes 64-70.

61. See Arthur Goodhart, *Costs*, 38 YALE L.J. 849 (1929); John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567 (1993). In England, this rule applies to all litigants, not just consumers. The argument here, of course, is that attorney fee shifting should be available only to consumers, as a means of eliminating the inherent inequalities in the common-law enforcement system.

consumer's difficulty in initiating a lawsuit because the prevailing plaintiff's attorney would be compensated by the defendant, no matter how small the amount at issue. Recovery of attorney's fees would also reduce the inequality in trial expenditures between merchants and consumers. The merchant would continue to gain reputational advantages from investing resources in the trial, but these advantages would be counterbalanced by the increased costs in cases that it lost. The merchant would continue to benefit from the deductibility of the legal expenses, but its willingness to expend resources on the suit would also be counterbalanced by the increased costs incurred in losing cases. Finally, the consumer would no longer be risk averse, because the disadvantage of losing would be limited to opportunity costs and would not involve out-of-pocket expenses.<sup>62</sup>

There is nothing particularly obscure about this approach. The English Rule prevails in most developed countries, and there are numerous state and federal statutes with one-way fee-shifting provisions.<sup>63</sup> For the last twenty years, federal legislation involving commercial relationships between merchants and consumers has routinely provided for attorney's fee and court cost awards to prevailing consumer plaintiffs. The Truth-in-Lending Act,<sup>64</sup> the Fair Credit Reporting Act,<sup>65</sup> the Equal Credit Opportunity Act,<sup>66</sup> the Fair Debt Collection Practices Act,<sup>67</sup> the Electronic Funds Transfer Act,<sup>68</sup> the Expedited Funds Availability Act,<sup>69</sup> and the Magnuson-Moss Warranty Act<sup>70</sup>

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62. See Mauro Capelletti & Bryant Garth, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 27 BUFF. L. REV. 181 (1978); Albert Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792 (1966); Harold J. Krent, Essay, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039 (1993) [hereinafter Krent, *One-Way Fee Shifting*]; Harold J. Krent, *The Fee-Shifting Remedy: Panacea or Placebo?*, 71 CHI.-KENT L. REV. 415 (1995); Phyllis A. Monroe, *Financial Barriers to Litigation: Attorney's Fees and the Problem of Legal Access*, 46 ALA. L. REV. 148 (1982).

63. See MARY DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY'S FEES, at TS-1 to TS-36 (1992) (table of fee-shifting statutes); Capelletti & Garth, *supra* note 62; Mary Derfner, *The True "American Rule": Drafting Fee Legislation in the Public Interest*, 2 W. NEW ENG. L. REV. 251 (1979); Kenneth W. Starr, *The Shifting Panorama of Attorney's Fees Awards: The Expansion of Fee Recoveries in Federal Court*, 28 S. TEX. L. REV. 189 (1986). Indeed, the American Rule was not even dominant in America until the nineteenth century. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

64. 15 U.S.C. § 1640(a)(3) (1994).

65. *Id.* § 1681o(2).

66. *Id.* § 1691e(d).

67. *Id.* § 1692k(a)(3).

68. *Id.* § 1693m(a)(3).

69. 12 U.S.C. § 4010(a)(3) (1994).

70. 15 U.S.C. § 2310(d)(2) (1994).



all include such a provision. The UCC has resisted this rather general trend, however. Its most notable exception occurs in the new Article 2A's unconscionability provision.<sup>71</sup> This provision is substantively equivalent to the original unconscionability provision in Article 2,<sup>72</sup> but it adds the procedural feature that a court must award attorney's fees to a consumer lessee upon a finding of unconscionability.<sup>73</sup> Precisely why the award of attorney's fees was limited to this single cause of action is left unexplained; presumably, the drafters were treating attorney's fees as a form of punitive damages, to be awarded in cases of egregious behavior, rather than as a mechanism for redressing a widespread institutional inequality. It can thus be regarded as a fairly traditional damage enhancement provision in modern consumer protection clothing. This interpretation is reinforced by a connected provision which allows the business lessor to collect attorney's fees from the consumer if the consumer maintains a "groundless" claim of unconscionability.<sup>74</sup> As Donald King points out, this will probably vitiate the effect of the pro-consumer provision.<sup>75</sup> Given the greater risk aversion of consumers, as described above, they will probably avoid unconscionability claims entirely rather than try to obtain an award of attorney's fees at the risk, however slight, of receiving the bill for the lessor's overpaid, over-assiduous team of lawyers.<sup>76</sup> In general, two-way free-shifting provisions, while they display a superficial even-handedness, do not redress the intrinsic imbalance between merchants and consumers and may often make the situation worse.<sup>77</sup>

The Code contains one other particularly peculiar attorney's fees provision. The Official Comments to sections 3-416 and 3-417 suggest that banks may be awarded attorney's fees when suing for violation of transfer or presentment warranties.<sup>78</sup> The rationale seems to be that a person who takes an instrument that carries such a warranty is entitled to the warranty's full benefits and should not be required to incur any expenses to obtain those benefits. However, there is no basis for distinguishing between the transferee

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71. U.C.C. § 2A-108 (1995).

72. *Id.* cmt. Changes ("Subsection (1) is taken almost verbatim from the provisions of Section 2-302(1).").

73. *Id.* § 2A-108(4)(a).

74. *Id.* § 2A-108(4)(b).

75. King, *supra* note 1, at 870-77.

76. This aspect of the provision further emphasizes the extent to which attorney's fees are conceived as punishment, rather than consumer protection.

77. See Krent, *One-Way Fee Shifting*, *supra* note 52.

78. See U.C.C. § 3-416 cmt. 6 (1995); *id.* § 3-417 cmt. 5.

of a warranted instrument, generally a bank, and a consumer, except that the drafters could empathize with the former but not the latter. In any event, these provisions are exceptional. For the most part, the UCC ignores the costs of litigation and does not allow, or even recommend, that anyone receive attorney's fees.

This blindness to the costs of litigation is characteristic of the common law.<sup>79</sup> Traditionally, the common law did not provide for court costs, attorney's fees, or prejudgment interest; the implicit idea is that these transaction costs of litigation simply do not count, that the money that the litigants lose in pursuing their suit is not the same kind of thing as the money they lose when one party fails to deliver the promised product or to pay a promissory note. This idea is so obviously wrong that one is tempted to find its origin in the medieval practice of trial by combat. If one fought for oneself, one incurred no expenses; of course, the horse, armor, and squire were quite expensive, but a knight was expected to possess these items already, as an obligation of his status.<sup>80</sup> If one named a champion to fight on one's behalf, that person was supposed to act on the basis of loyalty and commitment, which also came without pecuniary expense. This provided the link between the person's guilt or innocence and the champion's failure or success.<sup>81</sup> Buying a champion would have severed that link and made the outcome too dependent upon the person's monetary resources; even in the Middle Ages, people were not certain enough of divine intervention to challenge it by authorizing mercenary combatants.<sup>82</sup>

English courts, where the common law was born, now award attorney's fees to prevailing parties.<sup>83</sup> However, the common law's mindset that lawsuits are cost free, or that their costs do not count, lives on in below-market statutory interest rates and in the American Rule that precludes attorney's fees.<sup>84</sup> Full compensation for the plaintiff seems harsh, almost punitive, to us, because it would lead to such substantial increases in the size of the award. But this only indicates the magnitude of the transaction costs of litigation, transaction costs that often overwhelm the amount at issue where consumers

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79. See SUNSTEIN, *supra* note 8, at 220-21.

80. See MARC BLOCH, *FEUDAL SOCIETY* 288-302 (L.A. Manyon trans., 1961); FRANCES GIES, *THE KNIGHT IN HISTORY* 2-20 (1984).

81. See Bloomfield, *supra* note 43, at 548; Russell I, *supra* note 43, at 111.

82. See, e.g., Russell II, *supra* note 43, at 145 (prohibiting hired champions in criminal appeals). That is not to say that this practice did not exist, but only that it was not authorized.

83. See Vargo, *supra* note 61, at 1569.

84. See *supra* note 61.

are involved. The UCC's unwillingness to provide compensation of these costs to consumers allows the difficulties of initiation and trial to continue in full force. Unlike federal legislation in the commercial area, the Code has never freed itself from the ancient common-law idea that litigation is a cost-free enterprise.

*b. Self Help*

A second way that the UCC embodies a common-law approach to remedies lies in its permissive attitude toward self-help by the powerful. Self-help can be defined as one party's ability to take control of an item or sum of money in dispute without judicial intervention.<sup>85</sup> It does not represent a final disposition of the dispute, since the other party can always appeal to the courts; rather, its function is to shift the burden of initiating that appeal from one party to the other. Thus, self-help compels the other party—absent an ability to resort to countervailing self-help—to initiate a lawsuit if it wants redress. While self-help is extra-judicial, it is not necessarily extra-legal; the law can permit or even authorize self-help, and the person who avails herself of this opportunity is not the same as the person who threatens to break the kneecaps of a defaulting borrower.<sup>86</sup>

The UCC does not adopt any consistent position on the issue of self-help, contenting itself largely with the codification of traditional approaches. Llewellyn incorporated a number of provisions in Article 2 which authorize one party to take action of various kinds in the face of actual or anticipated breach<sup>87</sup> but these generally take the form of mitigating potential damages. Perhaps the most important is section 2-717, which authorizes the buyer to deduct from future payments any damages attributable to the seller's breach. This is a valuable self-help remedy for consumers, although it is only

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85. See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 163-205 (1985); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 125-31 (1995); Oliver E. Williamson, *Credible Commitments: Using Hostages to Support Exchange*, 13 AM. ECON. REV. 519 (1983).

86. As the examples indicates, the precise status of self-help may involve the interplay of criminal and civil law.

87. See, e.g., U.C.C. § 2-508 (1995) (cure by seller of improper tender or delivery); *id.* § 2-601 (buyer's right to reject goods upon improper delivery); *id.* § 2-608 (revocation of acceptance); *id.* § 2-610 (anticipatory repudiation); *id.* § 2-705 (seller's stoppage of delivery in transit); *id.* § 2-706 (seller's resale of unpaid-for-goods). The best explanation for these provisions has been suggested by Allen Kamp, who points out that Llewellyn, like the drafters of the National Industrial Recovery Act, was motivated by a desire to stop "chiseling" by businesses. See Kamp, *supra* note 24, at 365-67.

applicable in credit or installment sales. In the original Code, it was partially counteracted by Article 3's holder-in-due-course doctrine, which allows a financier to cut off defenses to payment based on damage claims, thereby denying this self-help remedy to the consumer.<sup>88</sup> But this doctrine proved so oppressive that the Federal Trade Commission ("FTC") declared it an unfair and deceptive trade practice with respect to consumers.<sup>89</sup> Revised section 3-106(d) grudgingly acknowledges the FTC rule (without mentioning the "F" agency in the text) and salvages as much of the doctrine as it can.<sup>90</sup> In addition, it is possible, as Donald King suggests,<sup>91</sup> that section 2A-212 eliminates the ability of a finance lessee to use the self-help remedy of withholding payment,<sup>92</sup> which would be an unfortunate throwback to the holder-in-due-course doctrine. There are also some other self-help provisions in Article 2. Sections 2-502 and 2-702 permit a buyer to recover paid-for goods from an insolvent seller,<sup>93</sup> and a seller to recover unpaid-for goods from an insolvent buyer.<sup>94</sup> These provisions generally operate in favor of merchants, however, and will not ameliorate the consumer's difficulties in initiating a lawsuit.

Article 9 contains what is probably the most famous and perhaps notorious self-help provision in the UCC—and the only one that has been the subject of a motion picture.<sup>95</sup> This is section 9-503, which allows a secured party to repossess the collateral in the event of the borrower's default.<sup>96</sup> In consumer cases, it operates in favor of merchants because it creates more cases where the consumer, rather than the merchant, must initiate litigation. In effect, it reverses the burden of going forward in many cases involving the sale of goods where consumer self-help would otherwise be possible. Under ordinary circumstances, the consumer must pay for the goods before

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88. U.C.C. §§ 3-302, 3-306 (1995).

89. 16 C.F.R. § 433.2 (1996) (requiring notice of the availability of defenses for consumers).

90. This conclusion is based upon the analysis in Michael F. Sturley, *The Legal Impact of the Federal Trade Commission's Holder in Due Course Notice on a Negotiable Instrument: How Clever Are the Rascals at the FTC?*, 68 N.C. L. REV. 953 (1990).

91. See King, *supra* note 1, at 877-80.

92. The relevant language reads: "Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract . . ." U.C.C. § 2A-212(1) (1995). The lack of this implied warranty in finance leases is not as preclusive as the holder-in-due-course doctrine, but it might allow a finance lessor to override the lessee's self-help efforts.

93. *Id.* § 2-502.

94. *Id.* § 2-702.

95. REPO MAN (United Artists/Edge City 1984).

96. See U.C.C. § 9-503 (1995).

receiving physical control of them. As a result, the consumer cannot resort to self-help if the goods are defective. When the consumer buys on credit, however, she can refuse to pay for goods that she believes are defective, forcing the merchant to initiate the lawsuit. Self-help repossession under section 9-503 enables the merchant to place the burden of initiating litigation back on the consumer and thus partially counteracts section 2-717. However, it is only available when the merchant has obtained a security interest in the item sold, and only economical when the item is of substantial value. Moreover, since the Code, not surprisingly, prohibits self-help repossession that involves a breach of the peace, this remedy is useful largely for automobiles. But it is important in this context and indicative of the Code's general approach.

In Article 4, section 4-403 authorizes consumer self-help by allowing bank customers to stop a check at any time before their bank has paid it.<sup>97</sup> Rather atypically for Article 4, this authorization is described as a "right" of customers, one which they are "entitled to receive."<sup>98</sup> It applies to all bank customers, but since commercial customers can bargain for stop-payment rights in any case, the principal beneficiaries of the provision are consumers. Stopping payment on a check shifts the burden of initiating a lawsuit from the consumer to the merchant and is thus a fairly powerful self-help remedy. Of course, it operates to the disadvantage of the merchant, not the bank; for the bank, it is only a minor inconvenience. Indeed, the bank is protected if it fails to obey the stop order; Article 4 provides that when a customer sues its bank for such a failure, the customer must prove the amount of the loss.<sup>99</sup> This means in effect that the customer loses her self-help remedy if the bank makes a mistake.

There are also a number of opportunities for self-help available to banks in the ordinary bank-customer relationship, and these Article 4 leaves undisturbed. The best known is the setoff, by which a bank that has lent money to its customer can deduct the amount it is owed from the customer's account if the customer fails to pay.<sup>100</sup> The theory is that because the bank is

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97. *Id.* § 4-403.

98. *Id.* § 4-403 cmt. 1.

99. *Id.* § 4-403(c). See Rubin, *supra* note 2, at 750. In 1987, an American Bar Association subcommittee responsible for reviewing revisions to Articles 3 and 4 rejected an effort to modify this provision to provide that the bank would be responsible for its own errors. See *id.* at 750-52.

100. See generally Barkley Clark, *Bank Exercise of Setoff: Avoiding the Pitfalls*, 98 BANKING L.J. 196 (1981); Richard B. Hagedorn, *Bank Setoff in Washington—Is It a Right Without Restriction?*, 15 GONZ. L. REV. 989 (1980); William H. Loyd, *The Development of Set-off*, 64 U. PA. L. REV. 541

the customer's debtor with respect to the account balance and its creditor with respect to the loan, the two debts simply cancel one another out. Common law only permits a matured debt to be set off, but lenders often place an acceleration clause in their loan agreement with consumers. This clause enables the lender to accelerate the entire debt whenever some condition is breached or, in some cases, whenever it "deems itself insecure"; the preternaturally matured debt can then be set off against the customer's account.<sup>101</sup> The UCC is silent on the issue of setoffs, thus leaving the common law intact.

A less generally recognized, but even more important, opportunity for bank self-help that is also left untouched by Article 4 is the bank's ability to deduct an amount in dispute from the customer's account. In doing so, the bank takes advantage of its position as the physical possessor of the customer's money, just as a credit buyer can take advantage of his physical possession of the purchased item. Most banks will not violate the law and remove money from a customer's account without justification. But when a dispute between the bank and its customer arises, and each side believes it is in the right—such being the nature of disputes—the bank can obtain its desired remedy almost costlessly by self-help, leaving its customer to initiate litigation.

Federal law, once again, has modified or eliminated some of the merchant's opportunities to use self-help. The Truth-in-Lending Act, for example, forbids credit card debts to be set off against other accounts.<sup>102</sup> It also allows card holders to reverse certain charges that a merchant has entered against their credit card account, thus shifting to that merchant the burden of initiating litigation.<sup>103</sup> Both the Fair Credit Billing Act<sup>104</sup> and the Electronic Fund Transfer Act<sup>105</sup> address the issue of bank errors: although neither Act requires an automatic reversal of charges that the customer challenges, they do give the customer the right to obtain an explanation for the charges and

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(1916); Stephen L. Sepinuck, *The Problems with Setoff: A Proposed Legislative Solution*, 30 WM. & MARY L. REV. 51 (1988).

101. See, e.g., *Crocker-Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631 (9th Cir. 1977); *Jensen v. State Bank of Allison*, 518 F.2d 1 (8th Cir. 1975); *Fleischmann v. Mercantile Trust Co.*, 617 S.W.2d 73 (Mo. 1981) (en banc).

102. 15 U.S.C. § 1666h (1994).

103. *Id.* § 1666i. The required circumstances are that the card owner has made a good faith effort to resolve the dispute with the merchant, the amount of the transaction exceeds \$50, and the transaction occurred in the card owner's state or within one hundred miles of her mailing address.

104. *Id.* § 1666.

105. *Id.* § 1693f.

they impose penalties on banks that fail to correct billing errors.<sup>106</sup> These provisions, together with the closely related restrictions on wage garnishment,<sup>107</sup> emerge from a recognition of the consumer's difficulty in initiating and pursuing litigation.

The UCC, in contrast, is largely oblivious to this concern; its approach to self-help is generally to leave the common law unchanged, either by codifying traditional rules or by omitting any mention of these rules.<sup>108</sup> It is at least possible to discern a general policy in the Code favoring self-help by the strong over the weak and to associate this attitude with the early medieval era. At that time, when both the Roman Empire and its pallid, Holy successor had disintegrated, and nation states had not yet coalesced, each local count or baron had a group of armed vassals at his disposal, and self-help was a standard means of enforcing the law.<sup>109</sup> Trial by combat is a barely judicialized version of this rather primordial approach to dispute resolution. Yet the medieval era cannot quite be described as a regime of might-makes-right. There was always a sense that the proper outcome was independently prescribed by law, and the prevalence of armed conflict was seen as either a necessary expedient in the case of actual combat, or a means of demonstrating divine will in the case of judicial combat.<sup>110</sup> Thus, it would be more accurate to say that medieval society displayed a pragmatic acceptance of self-help in some circumstances and an effort to formalize and contain it in others. This is also a more precise description of the approach that the UCC adopts. What is missing, of course, is the modern notion that the state has a positive obligation to redress the inequalities created by industrial society. This notion translates into the position, embodied in a number of federal laws, that self-help is a rather dangerous mechanism whose traditional uses must be

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106. Technically, the bank is not engaging in self-help when it charges the customer's credit account or refuses to revise that charge, because the customer can refuse to pay. *Id.* § 1666. But the bank can cancel the customer's account and report the customer to a credit agency, which is akin to self-help. That is the rationale for the protection provided in section 1666.

107. *Id.* §§ 1671-1674. Significantly, these provisions are publicly enforced by the Labor Department. *Id.* § 1676.

108. Self-help repossession and stop payments, which are common-law mechanisms, are explicitly authorized. U.C.C. §§ 9-503, 4-403 (1995). Setoff is recognized by the UCC, but neither regulated nor defined. *Id.* §§ 4-303, 9-104(i), 9-306(4)(d). The bank's ability to withdraw funds from the customer's account is not mentioned.

109. See generally BLOCH, *supra* note 80, at 125-30, 359-437; F.L. GANSHOF, *FEUDALISM* 156-67 (Philip Grierson trans., 1996).

110. See Russell I, *supra* note 43.

eliminated, modified, or at least consciously evaluated in order to achieve both fairness and inefficiency.

*c. Statutory Damages*

A final way in which the UCC embodies a common-law approach to remedies is its requirement that a plaintiff prove her actual damages. The alternative, which could partially reverse the imbalance between merchants and consumers, is the use of statutorily established damage awards. In a significant number of commercial cases, liability is uncontested or relatively easy to determine, and the difficult issue is the measure of damages. This occurs, most typically, when consequential damages are involved; examples include lost profits resulting from the defectiveness of a purchased or leased item, or disruption of commercial relationships resulting from wrongful dishonor of a series of checks.<sup>111</sup> A statutorily liquidated amount, or a mechanical rule by which damages can be calculated without proving actual loss, will lower litigation costs significantly in cases of this nature. It is not a complete solution, but since cost, unlike virtue, works exclusively by increments, any reduction will improve consumers' ability to protect their rights.

Once again, federal law recognizes this principle while the UCC generally does not. Under the Truth-in-Lending Act, a consumer can obtain twice the amount of the finance charge, in addition to actual damages, from a creditor who violates the statute.<sup>112</sup> The Fair Debt Collection Practices Act,<sup>113</sup> the Electronic Fund Transfer Act,<sup>114</sup> and the Expedited Funds Availability Act<sup>115</sup> all authorize statutory damages up to \$1000, based on criteria such as the frequency and persistence of the financial institution's noncompliance. In contrast, the UCC holds firmly to the common-law idea that "damages" represent the actual amount that is lost and that the primary purpose of a lawsuit is to compensate the plaintiff in this exact amount. According to this

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111. See U.C.C. § 2-715(2) (1995) (authorizing consequential damages for buyers); *id.* § 2A-520(2) (authorizing consequential damages for lessees); *id.* § 4-402(b) (authorizing consequential damages for customers); *cf. id.* § 4A-305 (requiring written agreement of customer's bank before bank can be held liable for consequential damages resulting from improper execution or non-execution of a funds transfer).

112. 15 U.S.C. § 1640(a)(2)(A)(i) (1994).

113. *Id.* § 1692k(a)(2)(A).

114. *Id.* § 1693m(a)(2)(A).

115. 12 U.S.C. § 4010(a)(2)(A) (1994).



view, approximations constitute injustice, and the failure of most consumers to assert their rights cannot justify any formula that might overcompensate those remaining ones who persevere.<sup>116</sup>

The device of statutorily liquidated damages was conceptually available to the UCC's original drafters, as indicated by section 9-507, where debtors whose collateral is consumer goods are granted minimum damages in the amount of the credit service charge plus 10% of the principal amount if the creditor fails to dispose of repossessed collateral in the required manner.<sup>117</sup> In general however, the UCC does not use this approach; it relies on the common-law requirement that damages must be proved. In fact, the UCC outdoes the common law in this respect. At common law, a merchant whose checks were wrongfully dishonored could obtain estimated damages based on the size of its business, its income, its prospects, and its general need for credit.<sup>118</sup> The UCC's original Article 4 tried to abrogate this rule and require the frequently impossible and inevitably expensive task of proving actual damages, but its awkward drafting left an apparent exception for willful dishonors. Several courts, conscious of the plaintiff's burden, took advantage of this exception to estimate damages.<sup>119</sup> Revised Article 4 dutifully eliminates the loophole.<sup>120</sup>

In summary, the UCC is a partial response to the institutional inadequacies of the common law. Those inadequacies that were discerned by Bentham and emphasized by legal realism—the disorganization and uncertainty of the common law—are decisively addressed by the Code. But the inadequacies that were subsequently discerned by the legal process school and the

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116. For a description of discussions where this frame of mind was revealed, see Rubin, *supra* note 2, at 768-70.

117. U.C.C. § 9-507(1) (1995). There is an alternative formula if the credit charge is stated as a time price differential, which is the time-price differential plus 10% of the cash price. Like Article 2A's attorney's fee provision, *see supra* notes 71-77, this liquidated damages provision seems to be a special penalty for egregious conduct, rather than a mechanism for redressing structural inequalities.

118. This was the so-called "Trader Rule." *See* William L. Daniels, *Bank Liability for Wrongful Dishonor: UCC Section 4-402—Is Revision Needed?*, 8 IND. L. REV. 802 (1975); William B. Davenport, *Wrongful Dishonor: UCC Section 4-402 and the Trader Rule*, 56 N.Y.U. L. REV. 1117 (1981); Steven B. Dow, *Damages and Proof in Cases of Wrongful Dishonor: The Unsettled Issue Under UCC Section 4-402*, 63 WASH. U. L.Q. 237 (1985); Tommy Lee Holland, *An Analysis of the Legal Problems Resulting from Wrongful Dishonors*, 42 MO. L. REV. 507 (1977).

119. *See, e.g.*, Elizarras v. Bank of El Paso, 631 F.2d 366 (5th Cir. 1980); American Fletcher Nat'l Bank & Trust Co. v. Flick, 252 N.E.2d 839 (Ind. App. 1969); Yacht Club Sales & Servs., Inc. v. First Nat'l Bank of N. Idaho, 623 P.2d 464 (Idaho 1980); Loucks v. Albuquerque Nat'l Bank, 418 P.2d 191 (N.M. 1966).

120. *See* U.C.C. § 4-402 cmt. 3 (1995).

consumer movement—the ineffectiveness of privately initiated judicial trials as a means of enforcing the law—were almost entirely ignored.

## II. THE CONSEQUENCES OF THE CODE'S COMMON-LAW APPROACH

On an intuitive level, the rather drastic imbalance between consumers and merchants which the UCC embodies seems obviously wrong. Since intuitive ideas about law are not always reliable, however, it is worth considering the social policy problems that the Code's common-law approach presents in somewhat more detail. Two basic problems are considered here: first, that the Code offends our basic sense of fairness and second, that it is economically inefficient.

### A. Fairness

It is an essential element of our socially developed sense of fairness that litigants should come to court as equals. Their chances of prevailing should depend upon the strength of their legal positions, and not upon attributes external to the case such as their appearance, religion, or personal wealth. Of course, the party with the stronger legal case will not always win. According to one view, which Rawls labels pure procedural justice,<sup>121</sup> this is not at all unfair; fairness only requires that the proper procedures be followed. The opposing view is that fairness consists of substantive justice; that is, the right result.<sup>122</sup> This would prescribe a particular outcome in every case; because errors will inevitably occur, however, a system can be regarded as fair under a substantive standard if it produces the prescribed outcome most of the time.

Equality has not always been central to society's sense of fairness, however. In the Middle Ages, society was organized hierarchically and one's rights depended on one's position. As James Lindgren points out, virtually all ancient law codes set different penalties for the same offense on the basis of the victim's status.<sup>123</sup> In the Salic Law, promulgated by King Clovis of the Franks around 510 A.D., the penalty was 24,000 denari for killing a free boy,

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121. JOHN RAWLS, A THEORY OF JUSTICE 83-90 (1971).

122. Rawls uses the term perfect and imperfect procedural justice, rather than substantive justice. *Id.* at 85 & n.14. The basic idea is that "there is an independent criterion" of fairness for perfect or imperfect justice; the distinction between the two depends on whether one can devise an infallible procedure for satisfying the criterion. *Id.* at 85.

123. James Lindgren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.-KENT L. REV. 149 (1995).

8000 denari for killing a free girl, and 3000 denari plus actual damages for killing a household slave.<sup>124</sup> In Saxon law, the wergild was 100 shillings for killing a free man, but only six shillings—a real bargain—for killing the dependent of a commoner.<sup>125</sup> More generally, a person's position determined the law and court to which he was subject; in effect, different people lived in different legal regimes. Serfs were tried and punished by their masters, often according to rules that were particular to that master's domain. Free men were entitled to be tried by an assembly of free men, in other words, their peers, in accordance with more general law.<sup>126</sup> The breakdown of centralized authority in the tenth and eleventh centuries often meant that leading noblemen could only be tried before a court to which they had agreed to submit themselves.<sup>127</sup> Another distinction within the category of free persons was that people of ordinary means were often subject to harsh fines; indeed, the right to operate a court and collect these fines was a much coveted element of local administration.<sup>128</sup> Great nobles were regularly exempt from such fines; they possessed the right to trial by combat, and they received special protection against various judicial actions by non-noble persons.<sup>129</sup>

One cannot assert that the inequalities of the modern legal system are derived from medieval law. The point, rather, is that these sort of inequalities were regarded as just during the medieval era; a free person should count for more, and hence have more legal rights, than a serf; a member of the nobility should have more still. In contrast, the English Civil War and the Enlightenment generated, and ultimately imposed, the idea that every person should be equal before the law. Our 1789 Constitution and our Bill of Rights are products of this way of thinking. Thus, the idea of equality before the law, and a specific rejection of the medieval link between legal rights and status, is properly regarded as being central to our sense of fairness.

As discussed in the previous section, the common law's institutional structure, carried forward in the UCC, systematically favors merchants over consumers. In a lawsuit between the two, the consumer is distinctly disadvantaged, as surely as if the law provided that she was required to prove

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124. *Id.* at 178-84.

125. *Id.* at 198-201.

126. See BLOCH, *supra* note 80, at 368-70; FREDERICK POLLOCK & FREDERIC MAITLAND, A HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (1959).

127. See BLOCH, *supra* note 80, at 361-68; GEORGES DUBY, THE CHIVALROUS SOCIETY 15-58 (Cynthia Postan trans., 1977).

128. DUBY, *supra* note 127, at 34-44; J.C. HOLT, MAGNA CARTA 106-07 (2d ed. 1992).

129. See BLOCH, *supra* note 80, at 327-29; HOLT, *supra* note 120, at 50-74.

her case against the merchant beyond a reasonable doubt or that merchants could not be cross-examined by consumers. This violates the principle of pure procedural justice, because our sense of fairness requires that parties to a civil suit have an equal opportunity to prevail. It also violates the principle of substantive justice because the outcome of the process will vary greatly from the criterion of fairness established by the substantive law. The observed results in litigated cases greatly underestimate this variation because so many consumers “lump it” and do not initiate a lawsuit. In fact, the civil courts that adjudicate commercial cases could be viewed as a special institution that is closed to consumers, just as the medieval courts were closed to serfs.

The standard justification for this situation that is offered by the Code’s sponsors and proponents is that the Code is not intended to be a consumer law. That role, they suggest, is left to the individual states, which can supplement the Code—or indeed displace any portion of it—with statutes specifically designed to protect consumers.<sup>130</sup> For some of the Code’s articles this contention is entirely accurate. Article 4A, which deals with electronic fund transfers, specifically excludes consumers from its coverage; if a consumer is involved, the rules governing the transfer are established by a separate law, in this case a federal one.<sup>131</sup> Article 5, which deals with commercial letters of credit, and Article 6, which deals with the purchase of a merchant’s entire inventory, do not specifically exclude consumers, but consumers virtually never engage in such transactions. Because of these explicit or functional exclusions, Articles 4A, 5, and 6 are truly nonconsumer legislation.

This is simply not true of the Code’s other Articles, however. Their subject matter, which includes sales of goods, leases, payment by check, and security agreements, regularly involves consumers and, indeed, constitutes a large proportion of the commercial transactions in which consumers are involved. In this context, it is difficult to know what the sponsors’ assertion that the Code is not consumer law could mean, apart from a concession that it is anticonsumer law. The sponsors’ argument implies that there are two

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130. See Miller, *supra* note 4, at 412-14; A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 670-78 (1996); National Conference of Comm’rs, *supra* note 4. David Rice reports that these same arguments were raised during the Article 2 revision process. David A. Rice, *Lessons About the Realities of Contract for U.C.C. Article 2 Revision and a Future Software Contract Statute*, 18 RUTGERS COMPUTER & TECH. L.J. 499, 500-01 (1992).

131. U.C.C. § 4A-108 (1995) (“This Article does not apply to a funds transfer any part of which is governed by the Electronic Fund Transfer Act of 1978 . . .”).

naturally occurring and readily identifiable categories: ordinary law and consumer law. But there is no such distinction; a “consumer law,” in ordinary parlance, simply means a commercial statute that is fair to consumers. Consider, for example, the Electronic Fund Transfer Act (“EFTA”),<sup>132</sup> which governs the relationship between banks and consumers for a defined category of transactions. It states the body of rules that govern this relationship, just as Article 4 states the body of rules governing this same relationship for a differently-defined category. There is no other body of rules involved, no “ordinary law” that stands behind or beside the EFTA. Rather, the EFTA is the law in its area, and it counts as a “consumer law” only because it deals with consumers and is fair to them. When the sponsors of the UCC assert that the laws they have promulgated are not consumer laws, despite the fact that consumers are covered, all that really means is that these laws make no effort to treat consumers fairly.

Proponents of the UCC offer two arguments that are intended to establish a separate category of consumer law and thus present the UCC as something other than an effort to favor merchants over consumers. The first is that the Code is merely following tradition, that it organizes and clarifies the common law without venturing into the more controversial, policy-oriented realm of modern legislation.<sup>133</sup> This is true in part and is precisely the argument of this Article—that the UCC’s unfairness to consumers stems from its conceptual commitment to preexisting common law. It is a conceptual account that provides as good an explanation of the Code’s failure to be fair as the alternative hypothesis that the drafting process has been dominated by special interest groups. Not only is the effect the same, but the conceptual explanation is no more justifiable on moral grounds. It is one thing to have codified traditional common law in the 1940s, when the effects of that law’s institutional structure were unclear. It is quite another thing to urge the adoption of this codification in the 1960s, to maintain it in the 1970s and 1980s, and to revise it, without altering its institutional structure, in the 1980s and 1990s. Since the time of the Code’s original promulgation, the consumer movement has revealed the many problems with using the common-law approach as an enforcement mechanism for commercial disputes. Little, if any, federal law has been enacted in this era without recognizing those

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132. 15 U.S.C. §§ 1693-1693r (1994).

133. Miller, *supra* note 4, at 413 (“[C]onsumer provisions may preclude or destroy the necessary consensus on the commercial law.”); Homer Kripke, *Reflections of a Drafter: Homer Kripke*, 43 OHIO ST. L.J. 577 (1982); Overby, *supra* note 130, at 688-95.

problems and altering that approach. In other words, the same decision that sprang from unexamined legal instinct half a century ago is now equivalent to deliberate rejection of, and perhaps outright aggression against, consumer interests.

It is all a matter of contextualized, cultural understanding. In the Middle Ages, many statutes gave rights to free persons or the nobility, but excluded serfs; the legislators at that time simply could not conceive that the two groups would be treated equally.<sup>134</sup> Today, however, any statute that makes distinctions between classes of people—for example, a statute denying education or medical benefits to illegal aliens—is necessarily understood as a specific rejection of or an act of aggression against the excluded group. Our conceptual categories have changed, and the same act has a different meaning in the contemporary context. It is simply not possible to enact, or revise, a statute like the UCC in our present legal context without recognizing, at some level, that this statute rejects the mechanisms of fairness that have been so widely discussed and codified in other legislation.

A second argument that proponents of the UCC employ to assert the independence of consumer law is that the UCC is a nonexclusive statute. Individual states, it is said, are free to enact consumer protection measures if they choose, but the Code, which is intended to be uniform, should only address general questions of commercial law.<sup>135</sup> Again, this point is partially valid; many sections of the Code are addressed only to merchants. No one concerned about the plight of ordinary consumers has any objection to Articles 4A, 5, or 6; the interbank collection rules of Article 4; or to the parts of Article 2 that govern relations between merchants, such as section 2-207(2). However, the remainder of the Code does affect consumers and, indeed, it adopts rules that specifically disadvantage them. One cannot simply say that the Code should enact the same rules for merchants and consumers, for that is exactly the claim that has been rejected by the consumer movement, by federal legislation, and by any sustained analysis of commercial law.<sup>136</sup> It is the classic equal rights-to-sleep-under-the-bridge

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134. See generally BLOCH, *supra* note 80; DUBY, *supra* note 127.

135. Miller, *supra* note 4, at 413 (“[C]onsumer law in relation to Articles 3 and 4 has grown outside of the U.C.C. and as an appendage to it . . .”); National Conference of Comm’rs, *supra* note 4.

136. For landmarks in the development of the consumer movement, see DAVID CAPLOVITZ, *THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES* (1967); R. FELLMETH, *THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC* (1970); and RALPH NADER, *UNSAFE AT ANY SPEED* (1965). See also *supra* notes 42, 46 (analysis); *supra* notes 64-70 (federal statutes).

problem; equal treatment for consumers and merchants is inherently unfair to the consumer because the two groups are inherently unequal.

It is true, of course, that states are free to enact supplementary legislation if they wish. This is not really much of a concession because the sponsors of the Code are powerless to prevent such legislation. However, the Code purports to provide a comprehensive set of rules in the area it covers. It places the prestige and influence of its sponsors on the side of a statute that disadvantages consumers and urges adoption of that statute as a comprehensive law for its area of coverage. Moreover, the sponsors have consistently opposed nonuniform amendments, and NCCUSL has lobbied against such amendments with an unremitting, bare-knuckled fury.<sup>137</sup>

One of the most abiding legal insights of the last several decades is that there are no neutral principles in law,<sup>138</sup> that every legal rule has political consequences. While this does not necessarily make law equivalent to politics, it does suggest an inextricable and dynamic relationship between the two. The UCC is propounded as a neutral statute, but its neutrality is apparent only to those whom it favors. In fact, it is an anticonsumer law; it creates a system where consumers are systematically disfavored in asserting their rights. As a result, it violates our social policy of fairness.

### *B. Efficiency*

The second social policy that the UCC's institutional structure violates is economic efficiency. The analysis of efficient legal rules has been extensively explored and need not be reiterated here. For present purposes, the relevant question involves the efficiency of the enforcement mechanism. An enforcement mechanism can be inefficient if it distorts the law's underlying allocations of liability or if it implements these allocations accurately, but does so at greater cost than an alternative mechanism. The UCC's reliance on the common law's enforcement mechanism suffers from both forms of inefficiency.

As discussed above, reliance on privately initiated judicial trials places consumers at a significant disadvantage. In many cases, the consumer cannot initiate a suit to enforce her rights because the cost of litigating is greater than

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137. See Rubin, *supra* note 1, at 781-87.

138. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 30 (1977); ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 5-8 (1986); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REFORM 561, 564-66 (1988).

the amount at issue. Even if the consumer goes forward with litigation, a rational merchant will invest more than a rational consumer and achieve correspondingly more favorable results. Consequently, there will be massive underenforcement of consumer claims. Assuming that the substantive rules in the statute represent an efficient allocation of liability, the statute as a whole will be enormously inefficient as a result of the distortions produced by its enforcement mechanism.<sup>139</sup>

This conclusion seems to follow inevitably from the fact of systematic underenforcement; the only other possibility is that the allocations of liability in the statute are inefficient, and the distortions of the enforcement process counteract that inefficiency and produce an optimal result. Such an assertion cannot be based on the familiar theory that the common law tends to generate efficient rules because inefficient rules are litigated more intensively, or because the party who values a legal entitlement more highly will spend more resources litigating it in court.<sup>140</sup> That theory, which is itself highly implausible,<sup>141</sup> assumes an effective enforcement mechanism, equally available to all parties, so that inefficient rules will be regularly challenged and the economic value of an alternative rule will be reflected in the plaintiffs' litigation strategy. But the possibility that the massive underenforcement resulting from the UCC's common-law approach can compensate for the inefficiencies of its statutory rules is even more implausible. To begin with, since the enforcement inefficiencies operate by disadvantaging consumers, the substantive inefficiencies would need to favor consumers in order for the two to balance out. There are a few provisions, such as the unconscionability sections of Articles 2 and 2A,<sup>142</sup> the limits on contractually liquidated damages in Articles 2 and 2A,<sup>143</sup> and the customer's rights to stop payment in Article 4,<sup>144</sup> that are favorable to consumers, but most of the Code's provisions favor merchants. Opinions vary about which substantive rules would be most efficient, but no one has suggested that the

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139. See Woodward, *supra* note 52, at 1160.

140. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 255 (1979); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977).

141. See Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges*, 9 J. LEGAL STUD. 139 (1980).

142. U.C.C. §§ 2-302, 2A-108(1995).

143. *Id.* §§ 2-718, 2A-504.

144. *Id.* § 4-403.



UCC's rules are so consumer-oriented that they could counteract the massive bias against consumers in the enforcement process.

Quite apart from the fact that the UCC's biases all run in the same direction, the notion that distortions in the enforcement process will counteract inefficiencies in the substantive law to produce an optimal result seems fanciful. How likely is it that these two divergences from the optimal standard would be so well calibrated, and so evenly balanced, that an optimal result would obtain? In the case of the UCC, moreover, this marvelous equipoise of distortions would necessarily have occurred by chance, for no such calculation has even been suggested by any of the drafting groups. In fact, as noted above, the Code's enforcement mechanism does not even appear to be the result of conscious choice; rather, it was simply an unexamined continuation of a common-law system that seemed too familiar to require any serious attention.

Further, even if the UCC's common law enforcement mechanism did not distort the substantive balance between merchants and consumers, it would still be enormously inefficient. The reason lies in its expense; private litigation consumes an extremely high level of resources to resolve disputes. In the example given earlier, a \$10,000 dispute costs \$5000 to resolve: \$3000 of direct expenses by the consumer, \$2000 of direct expenses by the merchant. To this, one must add \$1000 in lost corporate taxes and the government's expense in operating a judicial system. Assuming that the trial lasts a mere half-day, it is difficult to imagine that the cost of paying the judge, paying the other judicial employees, and maintaining the physical facility housing the trial would amount to less than an additional \$1500. Thus, the total social cost increases to \$7500.<sup>145</sup> It is difficult to know, of course,

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145. Another way of measuring this same cost is to assume that legislative appropriations for the judicial system are fixed or that they vary due to factors extrinsic to the content of the docket, such as public tolerance for taxes and demands by other budget priorities. The social cost of commercial litigation then consists of the delays or summary procedures in other areas, such as torts and crimes, that may not be as amenable to alternative procedures. See THOMAS CHURCH, JR. ET AL., *JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS* (1978); James J. White, *Revising Article 9 to Reduce Wasteful Litigation*, 26 LOY. L.A. L. REV. 823 (1993). George Priest argues that the amount of private litigation will adjust itself to the available judicial resources, so that the level of court congestion will remain constant. George Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989); see also George Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163 (1982). This is an intuitively appealing argument (it seems to hold true for highways, among other things) but does not alter the fact that litigation creates a social cost. A means of law enforcement which did not rely on private litigation would enable the state to reduce the size of the judiciary without any decrease in social satisfaction or to leave the size of the judiciary unchanged and produce an increase in social satisfaction (assuming

what the proper level of transaction costs should be, but a seventy-five percent figure should reasonably initiate a search for alternatives.

It is precisely the expense of litigation that creates the distortion of the Code's substantive provisions, and one can eliminate a great deal of this distortion through the mechanism of attorney's fees. As discussed above, this mechanism is regularly employed in federal legislation, and only common-law traditionalism prevents its use in the UCC as well. Attorney's fee awards do not lower the total cost of litigation, however, but merely shift the costs from one party to the other. In fact, such awards may produce cost increases, because the party eligible to receive attorney's fees will lose its incentive to economize on costs as its perceived likelihood of winning increases. These incentives would operate on the lawyer, rather than the consumer himself, because the lawyer would generally take the risk of loss and be in control of the litigation strategy.<sup>146</sup> In fact, criticisms of overaggressive plaintiff's lawyers and strike suits have become a staple of legal reform efforts in recent years.<sup>147</sup> Attorney's fee awards are monitored by the judge to avoid unnecessary expenditure, to be sure, but such external monitoring is not a substitute for an internalized incentive structure.

As Marc Galanter and Mia Cahill observe, most cases settle.<sup>148</sup> They settle precisely because litigation is so expensive, and this process lowers the transaction costs of dispute resolution. But settlement alleviates very little of the inefficiency resulting from the enforcement mechanism's distortion of the substantive law, because the parties' willingness to spend resources on the litigation process is usually directly reflected in their settlement stance. Indeed, as argued above, the merchant can often use the possibility of

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that some parties would prefer to litigate rather than resolve disputes in other ways if dockets were less crowded).

146. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215 (1983); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Jonathan Macey & Geoffrey Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1996); Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); Charles W. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting and the Limits of Professional Discipline*, 47 LAW & CONTEMP. PROBS. 293 (1984).

147. Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 79 (1976); Ernest Gellhorn, *Too Much Law, Too Many Lawyers, Not Enough Justice*, WALL ST. J., June 7, 1984, at 28. See generally Marc Galanter, *Predators and Parasites: Lawyer Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

148. Galanter & Cahill, *supra* note 33.

settlement to increase its advantage over the consumer.<sup>149</sup> Settlement does, however, offer the possibility of reducing the inefficiency that results from higher litigation costs. The difficulty is that, as an alternative to extremely expensive litigation, the incentive to save expenses is correspondingly weaker than would otherwise be the case.<sup>150</sup> In the example used above, the two parties face a collective cost of \$5000; thus, any level of expense below \$5000 represents a net gain. Of course, the larger the gain, the greater the surplus that the parties can divide. However, the possibility of saving money through this mechanism is counterbalanced by the parties' incentives regarding the outcome of the litigation: the consumer wants the full \$10,000 judgment, while the merchant wants to avoid all liability. This induces the two parties to expend resources on establishing their position and intimidating the other side in order to obtain the best possible settlement or to prevail in litigation if the settlement efforts fail. The higher the litigation costs, and thus the more expensive the alternative to settlement, the more the parties are likely to spend on obtaining a favorable result. In other words, settlement costs tend to move upward toward a limit represented by the litigation costs they are designed to avoid. Some cases will settle almost immediately at very low cost, but others will only settle on the eve of trial, once a large proportion of the total costs have been expended.

Overall, it seems clear that the common-law system of enforcement is extremely expensive. When this is added to the distorting effects that it produces in the absence of attorney's fees, the result is an approach that violates the norm of economic efficiency, as well as violating the norm of fairness.

### III. ALTERNATIVES TO THE COMMON-LAW APPROACH

There is a tendency to regard the common law's institutional features of privately initiated judicial trials as a naturally occurring phenomenon. Until about a century ago it was atypical for anyone, at least in the United States, to even imagine the possibility of an alternative. Since then, different means of resolving disputes have become quite common and represent a significant component of our modern regulatory state.<sup>151</sup> But there remains the belief that the common-law system is the preferred approach, that it represents what

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149. See *supra* notes 54-59 and accompanying text.

150. Galanter & Cahill, *supra* note 33, at 1360-66.

151. See *infra* notes 163-67.

Cass Sunstein calls a baseline, that is, something from which variations must be specially justified.<sup>152</sup> This certainly seems to be the belief of the sponsors and drafters of the UCC; despite their assertions that they constitute a body of dispassionate experts who can engage in the kind of sustained analysis that state legislatures find impossible, they have never subjected their choice of the common-law approach to serious scrutiny.

In fact, the common-law approach is merely one mechanism for enforcing the law. It carries the imprimatur of tradition, but tradition, by itself, is not a particularly compelling argument. The countervailing argument is that, in consumer cases, this approach is unfair and inefficient. It would have been appropriate, therefore, for the sponsors and drafters of the UCC to seek alternative approaches. Three such alternative methods are considered below, representing increasingly large divergences from privately initiated judicial trials. They are reconceived procedures, public enforcement, and government-run testing centers.

#### *A. Reconceived Procedures*

The most conventional way by which the UCC could eliminate the imbalance between merchants and consumers would be to alter the procedures by which disputes are decided. Because much of this imbalance results from the high cost of legal representation, an obvious alteration would be to provide attorney's fees to a prevailing consumer plaintiff. This is, in fact, the strategy that has been adopted in federal legislation. It eliminates most of the unfairness that characterizes the common law and the UCC, but does not eliminate the inefficiency. With attorney's fee awards, the cost of resolving disputes remains inordinately high. Perhaps the defendant's additional risk will induce it to settle in many situations, but the plaintiff's decreased risk may render both client and attorney correspondingly less tractable.<sup>153</sup> There may even be an increase in attorney's costs; from an economic perspective, it is always dangerous to have one person paying the costs incurred by another person's decisions.<sup>154</sup>

Statutorily liquidated damages provide another procedural means of

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152. See SUNSTEIN, *supra* note 8.

153. See John C. Coffee, Jr., *supra* note 146; Krent, *One-Way Fee Shifting*, *supra* note 62, at 2079-88. Jeffrey Rachlinski suspects that it may make the defendants less tractable as well. See Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. (forthcoming 1997).

154. See generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996).

equalizing the positions of merchants and consumers in commercial disputes. It is admittedly dangerous to set dollar amounts in a statute that is intended to last for any length of time, but the stated amounts can be indexed, or the trier of fact can be given a list of criteria and told to make a reasonable assessment without taking evidence on actual damages. This device can be used whenever consequential damages are involved, or when the amount of damages is not readily determined by the purchase price of an item or the sum of money in dispute. It increases fairness because the cost of proving damages will often preclude any possibility of gain by doing so. Unlike attorney's fees, it is also more efficient because it reduces the total cost of litigation. To be sure, the liquidated amount may not be accurate, but the underenforcement that results when the law demands that consumers prove actual damages will result in a substantially larger inaccuracy. Besides, the effort to prove damages involves inaccuracies of its own, and does so at much greater expense.

Still another means of correcting the imbalance between merchants and consumers is to give consumers greater opportunities to use self-help. For example, in a dispute between the bank and its customer, the bank could be required to recredit the customer's account if the customer asserted that she was incorrectly charged. In a dispute between a consumer buyer and a merchant seller, the merchant could be required to give the consumer a full refund if the consumer returned the item. The bank or merchant could sue the consumer, of course, if it believed the consumer was not entitled to such recredit or refund. Because it is much easier for the bank or merchant to initiate litigation than a consumer, and somewhat easier for them, as repeat-players, to decide whether the litigation is worth initiating, the result would be both a more fair and a more efficient system for enforcing the substantive law.

All of these devices represent partial reforms of a dispute resolution system that, where consumers are concerned, is quite ancient and of questionable value. One might also counteract the unfairness and inefficiency of the traditional approach with a completely revised procedure, such as a telephone adjudication system. Great progress has been made in creating small claims courts, but even these courts require a personal appearance by consumer litigants, some amount of intimidating paper work, and uncertain enforcement of the court's decision. Suppose instead that disputes were adjudicated by telephone conference call. The consumer would initiate the process by calling a telephone number and giving the name of the merchant, the subject matter of the dispute, and a list of convenient times. The

adjudicator would then arrange a conference call with the consumer and the merchant in which each party would explain its position. Every merchant doing business in the jurisdiction would be required to maintain an electronically accessible bank account. If the adjudicator decided in favor of the consumer, she would immediately initiate an electronic fund transfer from the merchant's account to an account managed by the adjudicating agency, which would then send a check to the consumer. There would be no appeal.

The accuracy of the decisions produced by such adjudications would be only approximate, but the decisions in traditional adjudications are also approximate, albeit less so. The difference is that there are additional errors in traditional adjudication, due to the underenforcement problem, and these are almost always against consumers. The overall error rate of the telephone conferences would be lower and would be more evenly distributed between consumers and merchants. Perfect accuracy is an illusion, of course. In particular, it is the illusion of the medieval world, where the belief prevailed that human institutions should be modeled on a divine ordering—that there was a just solution, God knew it, and human beings should strive to attain it. Modern science, economics, and social science have taught us to replace precise answers with statistical distributions. We will never achieve perfect accuracy, and the effort to do so only generates greater distortions than a realistic approach. Heisenberg's principle<sup>155</sup> is that the measuring instrument inevitably disrupts the object being measured; it applies particularly when the object is small with respect to the measuring device, which is precisely the case with consumer lawsuits. The realistic approach, therefore, is to design systems to produce the lowest error rate. In consumer cases, that requires a dramatic decrease in the transaction costs of litigation, even if the adjudicator must decide on the basis of more limited information.

### *B. Public Enforcement*

The idea of using ombudspersons to enforce consumer law is a fairly familiar one,<sup>156</sup> but the foreign-language term conceals a more basic, if more radical-sounding, concept. In the Middle Ages, criminal law, like civil law

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155. See generally STEPHEN HAWKING, A BRIEF HISTORY OF TIME 53-61 (1988); RICHARD MORRIS, THE NATURE OF REALITY 51-55 (1987).

156. See generally WALTER GELLHORN, OMBUDSMAN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966); WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966).

then and today, was privately enforced; neither police nor public prosecutors existed. The victim or the victim's family made arrests, if either had the ability to do so. Commoners, who lacked horses and armor, generally raised a hue and cry, which required anyone within earshot to pursue the alleged malefactor. Once arrested, the person was placed in the custody of a government official, such as a bailiff, until trial, but the prosecution at the trial was performed, once again, by the victim or his family.<sup>157</sup>

Today, of course, the government has taken over arrest and prosecution. While the government agents who perform these functions, particularly the police, do not enjoy a stellar reputation, no one believes that we should return to private enforcement. One reason for the nearly universal approbation of public enforcement is that private enforcement of criminal law is a threat to civil peace. This does not provide any useful analogy for civil law however; once criminal law, that is the law governing the most basic and dangerous forms of social disobedience, becomes a public function, and a police force is created, all breaches of civil peace can be addressed. Thus, with public enforcement of the criminal law in place, the private enforcement of a civil law does not threaten the peace; any violence in the course of a commercial dispute can be defined as criminal and dealt with accordingly by public officials.

There is, however, a second set of reasons why private enforcement of criminal law was ultimately found to be inadequate, and these are directly applicable to commercial law. Leaving law enforcement in private hands results in uncertain and unreliable enforcement levels. Thus, even if civil peace is maintained, the other purposes of the substantive law may not be adequately achieved. In particular, private enforcement results in a lack of systematic surveillance or patrol, a lack of investigation, and a lack of adequate prosecution.

Surveillance is often regarded as a negative attribute of the modern state,<sup>158</sup> but if the underlying law is socially desirable, surveillance becomes a crucial element in the enforcement process. People can be expected to maintain surveillance of their personal property, but they may not do so

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157. JOHN G. BELLAMY, *CRIME AND PUBLIC ORDER IN THE LATE MIDDLE AGES* (1973); BLOCH, *supra* note 80, at 125-30, 359-74; DUBY, *supra* note 127, at 15-58; FRANCES GIES & JOSEPH GIES, *LIFE IN A MEDIEVAL VILLAGE 172-94* (1990); GEORGE C. HOMANS, *ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY 309-27* (1975).

158. STANLEY COHEN, *VISIONS OF SOCIAL CONTROL* (1985); MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., 1979).

effectively, and transaction costs may prevent them from maintaining surveillance of common areas. One of the principal reasons why Henry Fielding established London's first police force was to patrol the streets and other common spaces of the city.<sup>159</sup> In criminal law, the current demand is to increase surveillance or patrol, to put police back on the streets, and to demand that they take action to prevent minor crimes, such as broken windows, as well as major ones.<sup>160</sup>

The other steps in the process, investigation and prosecution, rely even more heavily on the expenditure of resources. This means that the willingness of private persons to implement these tasks depends upon their personal resources, the potential rewards of the process, and the resources of their opponents. As previously described, powerful barons in the early medieval period were virtually beyond the reach of the legal system because their resources were so large relative to the resources of a potential litigant. While none of these considerations disappear with public investigation and prosecution, their effects are greatly attenuated. The state's resources for any given task are far from unlimited, but they are relatively large. The benefits that the state derives from law enforcement are not absolute, but they extend well beyond the financial satisfaction or status restoration of the wronged individual. To be sure, the defendant's resources still count for a great deal, but the state cannot be intimidated and overwhelmed by these resources in the way that a private individual can be.<sup>161</sup> Finally, the state obtains various economies of scale in establishing permanent investigating and prosecutorial institutions—search costs are eliminated, clerical functions are routinized, and task-specific training is facilitated. Here again, the general demand by the American public is to provide more resources for these functions; even the most vociferous proponents of small government have not suggested that we deregulate criminal law enforcement.

All the reasons why private enforcement of the criminal law was found ineffective, and decisively rejected in favor of public enforcement, are true of consumer law as well. Consumer surveillance of their own affairs is often ineffective due to ignorance or lack of skill. Their ability to police complex frauds with diffuse impact upon individuals, such as incremental cost-cutting

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159. BENJAMIN JONES, HENRY FIELDING, NOVELIST AND MAGISTRATE (1993).

160. See FELTON EARLS & ALBERT J. REISS, JR., *BREAKING THE CYCLE: PREDICTING AND PREVENTING CRIME* (1992); JAMES Q. WILSON, *THINKING ABOUT CRIME* (1985).

161. The federal government's ability to prosecute Michael Milken clearly indicates that it is at least a match for even the wealthiest individual. See JAMES B. STEWART, *DEN OF THIEVES* (1991).



on product quality or minor overcharging by a financial institution, is very limited. Class action litigation is the only practical approach, and it has serious and well-known limitations. With respect to investigation and litigation, consumers generally lack the resources, the rewards of winning often do not justify their costs, and they generally find themselves confronting opponents with greater resources and more incentive for expending those resources.

Private enforcement of the civil law continues because merchants are generally able to protect themselves; they can maintain surveillance of their affairs and investigate and prosecute violations of their legal rights. Leaving law enforcement in their hands achieves all the virtues that economists proclaim. It matches legal role to private incentives, ensuring that the law will be assiduously enforced while avoiding all the familiar inefficiencies of governmental action. Because merchants are reasonably satisfied with this arrangement, there has not been the sort of generalized demand for public enforcement that exists in the criminal law area. Consumers, of course, have reason to complain, but they are not well organized because of a variety of collective action issues.<sup>162</sup> In other words, the very same circumstances that create the substance of their complaint against private enforcement militate against its effective presentation in the political process.

If we abandon our common-law mindset for a moment, we can imagine what the public enforcement of consumer claims might involve. A government agency could be assigned to monitor advertisements, sales practices, standard form contracts, and other merchant behavior. Upon finding a violation of the substantive commercial law, these contract police would report the alleged wrongdoer for prosecution. In addition, private individuals could call the contract police on their own. In either case, a public agency would investigate the claim. It could then mediate the dispute or, if it thought the case was sufficiently serious, recommend prosecution. All three of these functions could be combined within the same agency, or all three could be separate, or investigation could be combined with patrol or prosecution. Since there is no danger of civil discord, consumers could also be allowed to pursue private remedies, which might serve as a control on the agency's behavior.

Since these would be civil cases, not criminal cases, one basic purpose of

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162. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Leon Trakman, *David Meets Goliath: Consumers United Against Business*, 25 SETON HALL L. REV. 617 (1994).

the public enforcement should be to compensate the consumer. Precisely why criminal law does not compensate crime victims is a complex question that goes beyond the scope of this discussion. For present purposes, it is enough to note that the sense of vindication that a crime victim obtains from seeing the perpetrator imprisoned is not likely to be equaled by any remedy against a merchant that does not include compensation for the victim of a commercial wrong. Because this remedy would include compensation for noncomplaining victims, it is similar in effect to a class action, but without the procedural complexities. In appropriate cases, the remedy might also include a punitive element to be paid to the state or its designee. Of course, none of these remedies can be imposed upon a judgment-proof wrongdoer; it is also true, however, that a criminal defendant cannot be punished if he is dead and that does not deter us from establishing penalties for crimes.

The idea of consumer police, investigators, and prosecutors may seem too radical for the UCC—too much of a departure from established law to serve as the basis of a uniform state statute—but this impression is a product of the UCC's own limitations. In fact, legislation in a number of commercial areas has adopted precisely the approach described above. The antitrust laws<sup>163</sup> and the securities laws<sup>164</sup> provide for public enforcement of their substantive prohibitions against businesses, while permitting private suits to enforce these same provisions. It is notable that the direct beneficiaries of these laws are businesses, investors, or workers, all of whom have more political power than consumers to obtain favorable legislation. There are also a variety of other laws, such as the Federal Trade Commission Act<sup>165</sup> and the Consumer Product Safety Act<sup>166</sup> that provide public enforcement for consumer protection provisions, although their coverage is uneven and their impact unreliable. There is some significance in the fact that these are all federal laws, but the majority of states have also enacted laws that provide public enforcement for both business and consumer protection provisions.<sup>167</sup> In the

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163. 15 U.S.C. § 15 (1994) (amending prior and similar provisions of Sherman Anti-Trust Act and the Wilson Tariff Act) (private enforcement); *id.* § 4 (public enforcement).

164. Securities Act of 1933 §§ 11, 12, 17(a) (codified at 15 U.S.C. §§ 77k, 77l, 77(q)(a) (1994)) (private enforcement); Securities Exchange Act of 1934 §§ 7, 9, 10(b), 13(d), 14, 18 (codified at 15 U.S.C. §§ 77q, 78i, 78i(b), 78 m(d), 78n, 78r (1994)) (private enforcement); Securities Act of 1933 §§ 19-22 (codified at 15 U.S.C. §§ 77s-77v (1994)) (public enforcement); Securities Exchange Act of 1934 §§ 21-23 (codified at 15 U.S.C. § 78m-78w (1994)) (public enforcement).

165. Federal Trade Commission Act § 19 (codified at 15 U.S.C. § 57b (1994)).

166. Consumer Product Safety Act § 20 (codified at 15 U.S.C. § 2069 (1994)). The Act also provides for private remedies. *Id.* § 24 (codified at 15 U.S.C. § 2073 (1994)).

167. *See, e.g.*, Consumer Legal Remedies Act, CAL. CIV. CODE §§ 1750-1784 (West 1985 &

final analysis, the thing that makes public enforcement of commercial law seem radical is the common law, and the common law survives, in part, because the UCC has been so assiduous in preserving it. In fact, the UCC has maintained the common law's faith in private enforcement when most other legislative enactments have modified or abandoned that faith. Further, it has done so in an area where that continued fidelity to common law is both unfair and inefficient.

### *C. Testing Centers*

Revised procedures and public enforcement rely on the common-law system of judicial trials, although they vary the process of initiating the lawsuit and the cost of pursuing it. At bottom, they follow common law in treating the situation as a dyadic dispute between the complaining customer and the merchant. A more decisive departure from common law could be achieved by reconceptualizing consumer complaints as raising a question about an external, factual state of affairs. Thus, if the complaint involved a physical product, the consumer could bring the product to a government-run facility, where the staff would test it to determine whether or not it was defective. This complaint-processing function for consumer products would not be viewed as a component of a general complaint-processing institution, such as a court, but rather as a component of a general product-testing institution that also conducted tests on its own, without responding to specific complaints.

A system of exactly this sort has been instituted in Japan. It is run by the Ministry of International Trade and Industry ("MITI") and called the International Trade and Industry Inspection Institute ("ITIII").<sup>168</sup> ITIII consists of a head office in Tokyo, thirteen regional offices in major cities, and twenty-two local or prefectural offices. The local offices serve merely as complaint processing centers, but the regional offices are filled with

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Supp. 1997); Song Beverly Consumer Warranty Act, CAL. CIV. CODE §§ 1790-1795 (West 1985 & Supp. 1997); New Motor Vehicles Warranties Act, N.Y. GEN. BUS. LAW §§ 198-a to 199 (McKinney 1988 & Supp. 1997); New Motor Vehicle Warranties Act, ANN. MO. STAT. §§ 407.560 to .579 (Vernon's 1995); Retail Installment Sales Act, N.J. STAT. AM. §§ 17:16C-1 to -61 (West 1984 & Supp. 1996).

168. MINISTRY OF INT'L TRADE AND INDUS., OUTLINE OF INTERNATIONAL TRADE & INDUSTRY INSPECTION INSTITUTE ("ITIII") (undated Japanese government publication). Supplementary information comes from an interview I conducted on July 31, 1985, with various staff members of the Head Office of ITIII at Wakabayashi, Shinjuku, Tokyo.

equipment for product testing. For example, a pulley system tests the strength of mountain climbing ropes, while a treadmill tests the durability of roller skates. Tests are conducted as required by safety or registration laws, on MITI's own initiative, or in response to complaints that have been referred from the local centers.

If the ITIII testing center concludes that a product is defective, or inadequate for its purpose, it issues a report to the company. The report describes the test conducted, indicates the result, and recommends actions such as a change in the instruction manual, a production process change, a design change, or a recall of the product. When the report is the result of a consumer complaint, the company receiving the report will typically provide the consumer with a new product or a refund. The consumer retains the right to sue the company; in such a suit, either side may use the ITIII report as proof of the product's quality. Because this is Japan, such suits never occur. The company has the right to appeal the report's conclusion to MITI itself, and MITI may then order ITIII to conduct additional tests. There is also a way to file an official objection to the report, and even a way to sue MITI. However, this never happens either.

The intriguing idea that underlies the ITIII approach is that there is a reality external to any dispute between the consumer and the merchant—that products really are, or really are not, defective. If they are not defective, the consumer is not entitled to a remedy, and the company does not incur any expenses whatsoever in obtaining this result. If they are defective, the defect is corrected and the consumer compensated. The people who make these determinations are trained to test merchandise, rather than to represent one side of a dispute—they are engineers, rather than lawyers. Once they determine that a product is defective, MITI expects the company to take corrective action without any further efforts to contest its conclusions. The right to appeal is available in theory, but because MITI regards its conclusion as a factual finding, rather than the adjudication of a dispute, it would probably regard the exercise of this right as indicating the company's desire to continue producing a defective product and would react accordingly. The right to resist future consumer complaints, in the hope that these would be infrequent or that they might be evaluated in a different forum, is nonexistent. MITI's basic message is: "if it's broke, fix it."

Does the ITIII approach represent a fair and efficient response to consumer complaints? In terms of fairness, the first point to note is that public testing centers are necessarily staffed by government employees, and their performance thus depends upon the behavior of those employees. If the

agency were overly sympathetic to the merchants—"captured," in old-fashioned administrative law parlance—it would unfairly underenforce the substantive standards. If it were overly hostile to merchants—"meddlesome big government" in contemporary political parlance—it would overenforce those standards. Public choice scholarship has certainly taught us that we are not entitled to hypothesize rational, selfless, highly expert public officials and then compare the performance of this New Deal fantasy with the actual performance of the private litigation system.

It seems clear, however, that a system of testing centers would increase the fairness of the law if it were adopted as a nonexclusive remedy. Consumers would presumably go to the testing center, rather than suing the merchant, in circumstances when the net gain from doing so exceeded the net gain from litigation. This would frequently be the case because the transaction costs of bringing a product to the testing center would be similar to the cost of an initial visit to the lawyer's office, thus saving the daunting costs of subsequent visits, attorney's fees, and court charges. If the testing center decided that the product was defective, the consumer would receive exactly what she wanted, in most cases a refund or a nondefective product. Japan, with its strong traditions against litigation, often relies on the testing centers as the consumer's only remedy. In the United States, this would not be the case; therefore, the additional recourse to a testing center could only be advantageous to the beleaguered consumer.

Whether government testing centers are efficient is a closer question. They certainly represent a significant decrease in transaction costs because they dispense with attorneys. Moreover, a finding of defective design is equivalent to a judgment in a comprehensive class action suit, because it would be determinative in all subsequent complaints about the product. The costs of litigating a class action suit, as discussed above, are vastly more than the costs of an individual action. Therefore, it is really these costs that the testing procedure would save. While the operation of the centers themselves costs money, the cost per determination should be relatively low if they are used with reasonable frequency. A scientific test and a report issued to the manufacturer could resolve the \$10,000 dispute in the example given above much more cheaply than litigation. Assuming the testing process occupied two people for a day and the report occupied another person for an additional day, the total cost of the determination would be about \$1500, which is significantly lower than the \$7500 cost for litigation. Once the product was tested, subsequent disputes, presumably by consumers who bought the defective product before the required design change was made, would cost

only the small amount necessary to process their claim and transmit the information about the previous determination; added together these amounts would be significantly lower than those required for class action litigation.

One potential inefficiency in the testing process arises from the same source as the potential unfairness; the agency might overenforce or underenforce the substantive law. If consumers are also allowed to sue, the testing process can only decrease the existing underenforcement of the law. If the merchants are allowed to challenge the government testing centers—a breach of public etiquette in Japan but a national pastime in the United States—the possibility of overenforcement will be substantially decreased. In any event, it seems quite unlikely that any overenforcement would approach the absolute magnitude of the underenforcement that exists under the present UCC.

Another potential inefficiency of testing centers involves the definition of the term “defective.” A CD player that does not work at all is obviously defective, but what about one that breaks after eight months? Consumers do not want their products to break, of course, but they may prefer purchasing inexpensive products and replacing them more often, rather than spending larger initial amounts for a more reliable item. In other words, an apparently defective product may satisfy the desires of certain groups of consumers and thus conform to the principle of efficiency. From this perspective, MITI’s willingness to instruct companies to correct product defects may stem from its institutional interest in increasing Japanese exports, not from any interest in protecting consumers. The theory, presumably, is that a wealthy country like Japan can compete more effectively in a worldwide market for high quality products than in a worldwide market for shoddy ones. If this is correct, forcing Japanese firms to produce more high quality products might benefit the nation as a whole, but do so at the expense of Japanese consumers who prefer cheaper, lower quality products.

It may also be true, however, that the presence of shoddy products in the market is not the result of consumer choice but of a market failure due to asymmetric information. The consumer may believe the product is better than it actually is because he is not fully informed about the relationship between price and quality. He is willing to accept a product that is less elaborate, or less aesthetically pleasing, but he does not expect it to malfunction. The merchant understands that its lower cost production process will yield a certain number of malfunctioning products, but can take advantage of the consumer’s mistaken belief in the product’s reliability. If consumers knew that the product would malfunction, they would pay still less for it than the

merchant is asking. In this case, the defective product is inefficient, and the testing center's demand that it be redesigned would increase efficiency. In any event, this is an issue that could be resolved by clarifying the substantive law. It does not detract from the efficiency of testing centers as an enforcement mechanism.

As in the case of public enforcement, the testing centers are a regulatory response. They may, indeed, seem more regulatory, but that is probably because the government employees involved are scientists rather than lawyers. Because they represent an even further departure from common-law enforcement methods, testing centers may also seem even more bizarre and extreme than contract police and prosecutors. In reality, however, there is nothing particularly bizarre or extreme about them at all. Private firms use similar techniques on a regular basis to maintain the quality of their products. A number of them have established their own testing center, Underwriter's Laboratory, to maintain industry-wide standards. Consumers Union, the publisher of *Consumer Reports*, relies on a similar approach to inform consumers about product quality. Japan is an advanced industrial nation, like the United States, and its publicly funded testing centers do not seem to have harmed its economy very much. Indeed, MITI may be right to believe that providing consumers with higher quality products is ultimately a means of stimulating exports.

It is true that testing centers would require an explicit appropriation of public funds, something that the sponsors of the UCC presumably regard as anathema. But the cost of resolving a given product dispute by litigation is much greater if the costs to both parties and to the public are added together. Nor is there any saving in direct public outlays, because operating a system of testing centers is probably no more expensive than processing the same number of complaints through the judicial system.<sup>169</sup> If the aggregate cost of litigation is less than the aggregate cost of the testing centers, that is only because consumers cannot afford to use the judicial system which represents a poor way to save money. One could save still more money with a UCC provision stating that, regardless of the Code's allocation of liability, corporate parties shall never be allowed to litigate. Such a provision, however, would probably dampen the business support for the Code.

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169. This assumes that any appeals by U.S. merchants do not spur an additional round of confirmatory testing of the product. As discussed earlier, the Japanese culture essentially eliminates this possibility, but the U.S. culture might not.

#### *D. A Different UCC*

Suppose the drafters of the UCC had been able to free themselves from the common law's institutional structure, much as they freed themselves from its disorganization, its lack of uniformity, and to a lesser extent, the formalism of its substantive rules. Having done so, they might have designed mechanisms that actually enforced its provisions in consumer cases, rather than retaining mechanisms that reduce these provisions to empty verbiage where ordinary people are concerned. In particular, they could have provided improved procedures, such as attorney's fees for prevailing consumer plaintiffs, statutorily liquidated damages, and the authorization of self-help. Alternatively or in addition, the UCC could have provided for trial by telephone conference, for public enforcement of commercial disputes, or for government-run testing centers. Such an approach would have been fair, because it would have given consumers the same opportunity that businesses now have to enforce their legal rights. It would also have been efficient, assuming the UCC's substantive provisions are efficient, because it would enable these provisions to be implemented.

These suggestions may seem unrealistic, but as discussed above, that is not really true. All of them have been utilized in other settings, and most by federal legislation of one sort or another. They are far removed from the UCC's approach, but that is a reflection of the UCC's antediluvian mentality, not of any inherent impracticality of these alternative implementation mechanisms. Sponsors of the UCC could have positioned themselves at the forefront of the law, rather than at the rear; they could have established themselves as the protectors of ordinary people, rather than as their nemesis.

This brings us back to a consideration of the sponsors' motivations which were enumerated at the beginning of this Article. The sponsors strongly desired to enact uniform legislation; the mechanisms suggested here might be deemed objectionable because they are sufficiently controversial to have endangered that goal. But what is the social value of achieving uniform enactment of a law that is unfair and inefficient? The sponsors might argue that uniformity is an independent value because it lowers transaction costs and thus counterbalances the inefficiency of underenforcement. Uniformity, however, is primarily of value in interstate transactions between merchants. Consumer transactions tend to be local in character, and it seems unlikely that the fairly minor cost of complying with differing state laws would justify the extensive underenforcement of consumer rights.

It is also true that the procedural mechanisms required for consumers are



unnecessary, and probably counterproductive, if applied to merchants. But, the UCC could readily resolve this matter by distinguishing between merchant and consumer transactions. The sponsors have generally resisted efforts to do this, but it does not present any particular difficulties. Federal legislation regularly limits its scope to consumers, and does so by defining a consumer as a natural person.<sup>170</sup> This definition is only slightly overinclusive and has not proven difficult to apply. Article 9 has always contained a definition of “consumer goods,”<sup>171</sup> and Article 2A not only defines a category of consumer leases, but contains a variety of provisions that apply only to such leases.<sup>172</sup> These provisions establish some useful, albeit rudimentary, protections for consumer lessees, but even more importantly, they indicate that the UCC can readily accommodate separate protections for consumers.

It is far from obvious, moreover, that the inclusion of contemporary enforcement mechanisms such as attorney’s fees, public enforcement, or testing centers would have condemned the UCC to rejection by the states. The sponsors could certainly point to their unsuccessful experience with the Uniform Consumer Credit Code (“UCCC”), which did provide remedies enforced by an administrative agency.<sup>173</sup> However, by the time it was ready for enactment, the UCCC had been preempted, both figuratively and literally, by the Truth-in-Lending Act and is consequently not a good test of the states’ receptivity to legislation of this nature. Moreover, it did not carry the prestige and importance that attaches to the UCC. When the UCC itself has incorporated innovations, such as Article 2’s unconscionability provision or Article 9’s abolition of all traditional security instruments, most states have adopted them. It should also be recalled that the UCC was not an immediate success; nearly twenty years elapsed before it was adopted by a majority of states. During those twenty years, when state legislatures were gradually

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170. *See, e.g.*, Electronic Fund Transfer Act, 15 U.S.C. § 1693a(5) (1994). It is overinclusive in terms of the enforcement mechanism discussed here because some consumer transactions are large enough so that the cost of litigating does not rival or exceed the benefits of doing so. It may be somewhat underinclusive as well, because some businesses are so small that they may be in the same position as individuals. It is not underinclusive regarding small claims by larger businesses however. These businesses will make a rational decision about whether litigating a small case is beneficial to them. If they decide it is not, they will simply pass the cost on to their entire customer base. This is the efficient result, because the firm will generally have internalized all relevant costs, including the cost of continued violation of substantive legal standard.

171. U.C.C. § 9-109(1) (1995).

172. *Id.* § 2-103(l)(e); *see id.* §§ 2A-106, 2A-108, 2A-109, 2A-221, 2A-309, 2A-406, 2A-407, 2A-504, 2A-516.

173. *See* Warren, *supra* note 4.

acclimating themselves to the idea of displacing their own laws with a uniform statute, they might also have acclimated themselves to different kinds of enforcement mechanisms. In fact, the UCC has now become so retrograde that some state legislatures have varied its provisions to provide more protection for consumers.<sup>174</sup> New York deferred action on the Articles 3 and 4 revisions,<sup>175</sup> and Massachusetts rejected them outright on consumer protection grounds. In other states, the revisions survived consumer-oriented challenges only because of sustained lobbying by NCCUSL.<sup>176</sup> Thus, it seems quite possible that the UCC's failure to protect consumers is now as great a threat to uniformity as a fair and efficient statute would be.

A second, and somewhat less reputable motivation, for the UCC sponsors was to favor merchants over consumers. This indeed led to the exclusion of contemporary enforcement mechanisms, but it is not a particularly good argument for doing so. The sponsors might argue that they were required to work within existing political realities, but to some extent, political realities of the drafting process are their own fault. Until recently, they never undertook an affirmative effort to balance the business attorneys on the drafting committees with consumer representatives.<sup>177</sup> This might have been difficult during the 1940s, but it certainly would have been easier when the Code was reviewed and expanded in the 1960s, '70s, and '80s. Indeed, by the late 1960s, the drafting committees were much more one-sided than the U.S. Congress, a place where business interests do not go unheard, and this has continued to be true until the present time.

The sponsors' final motivation was conceptual. They were committed to the common law, not as a conscious belief, but as a habit of thought. As a result, the innovations that were developing in other areas, and being enacted by Congress and the states, continued to strike them as bizarre, imprudent, and unacceptable. This is indeed an impediment to enacting fair and efficient

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174. See, e.g., CAL. COM. CODE § 4406 (West 1992) (requiring banks that do not return checks to customers to provide a telephone number that customers can call for a legible copy, and to provide two items, or copies, per statement free of charge; and sunseting authorization to inform customer of the item number, amount and payment date of check, and nothing else, by January 1, 1998); W. VA. CODE § 46-4-406 (1993) (requiring all banks to offer at least one account in which items are returned, and to provide 18 items or copies per year free of charge).

175. Based on the author's participation in consideration of the Articles 3 and 4 revisions in these states.

176. Rubin, *supra* note 2, at 781-87.

177. See Gail K. Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B and 9 Be Fair to Consumers?*, 75 WASH. U. L.Q. 69 (1997) (discussing participants in the current drafting process).

enforcement mechanisms, but the solution is clear enough. The sponsors should think more critically about what they are doing. They should free themselves from the common law's quasi-medieval enforcement scheme, which has been preserved in the Code by force of habit, and devote sustained attention to the issue of consumer remedies.

#### IV. CONCLUSION

A long time has passed since Yvain and his pet lion constituted our society's image of ideal judicial procedure. The common law's approach to enforcement, with its reverberations of wergild, the hue and cry, trial by combat, and appointed champions, is out of place in a complex technological culture. It is not entirely bereft of value, but it no longer constitutes a persuasive argument against salutary innovations. The consumer movement, law and economics, and the administrative state provide us with extensive resources for designing fair and efficient commercial legislation for consumers. The sponsors of the UCC should make use of those resources to rethink institutional enforcement mechanisms that the Code incorporates.